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No. 07-____

IN THE
Supreme Court of the United States

ELIZABETH AGUILERA, PHILLIP ARELLANO, BENJAMIN BARDON, AND HECTOR RAMIREZ,
Petitioners,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 11, 2008

QUESTION PRESENTED

This Court has established that a public employer may compel employees to testify in internal investigations and may discipline those who refuse to cooperate only if it "offer[s] to [the employees] whatever immunity is required" to protect their Fifth Amendment rights against self-incrimination. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973).

Lower courts are divided three ways on what a public employer must do to offer employees that required immunity: (1) Three federal circuits and five state supreme courts hold that to compel potentially incriminating testimony a public employer must give employees a "*Garrity* notice," i.e., must notify employees of their immunity rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and explain the consequences of their decision whether to testify; (2) one federal circuit holds that a public employer can compel potentially incriminating testimony if the employees are deemed to have notice of their *Garrity* rights under an objective standard; and (3) three federal circuits (including the Ninth Circuit below) and three state high courts hold that a *Garrity* notice is entirely unnecessary and that a public employer can compel potentially incriminating testimony so long as it does not also compel employees to waive their *Garrity* immunity.

The question presented is:

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

PARTIES TO THE PROCEEDINGS

Petitioners Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Leroy Baca, individually and as Sheriff of the County of Los Angeles; William Stonich, individually and as Under Sheriff of the Los Angeles County Sheriff's Department; Larry Waldie, individually and as Assistant Sheriff of the Los Angeles County Sheriff's Department; William McSweeney, individually and as Commander of the Los Angeles County Sheriff's Department; Neil Tyler, individually and as Commander of the Los Angeles County Sheriff's Department; Thomas Angel, individually and as Commander of the Los Angeles County Sheriff's Department; Arthur Ng, individually and as Captain of the Los Angeles County Sheriff's Department; Alan Smith, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Margaret Wagner, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Russell Kagy, individually and as Sergeant of the Los Angeles County Sheriff's Department; Brian Proctor, individually and as Sergeant of the Los Angeles County Sheriff's Department; the Los Angeles County Sheriff's Department; and the County of Los Angeles, a municipal corporation, were the defendants in the district court and the appellees in the court of appeals.

Respondent Gustavo Carrillo was a plaintiff in the district court and an appellant in the court of appeals, but is not participating in the petition. Pursuant to Supreme Court Rule 12.6, Mr. Carrillo is considered a respondent in this Court.

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Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents a question of recurring significance affecting public employers and employees nationwide. The lower federal and state courts are hopelessly divided regarding when public employees who assert their Fifth Amendment right not to testify in internal investigations may suffer employment-related discipline for their silence. More specifically, the federal circuits are divided 3-3-1 (and state courts are divided 5-3) on whether public employers, before punishing employees who refuse to answer potentially incriminating questions, must inform them that the use immunity recognized by this Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967), overrides the Fifth Amendment right to remain silent, and thus that their testimony may be compelled.

Petitioners, four Los Angeles County sheriff's deputies under investigation for alleged use of excessive force, suffered significant job-related penalties because they refused to make statements in an internal criminal investigation. Because petitioners were neither explicitly ordered to testify nor informed of how *Garrity* immunity would apply in their situations, they reasonably believed that any testimony would constitute voluntary waivers of their Fifth Amendment rights. In ruling against them, a divided panel of the Ninth Circuit (over Chief Judge Kozinski's vigorous dissent) widened a deep and entrenched conflict involving at least seven circuits (and the highest courts of at least eight states).

The lower courts have had several decades and numerous opportunities to consider the proper application of *Garrity* and its progeny. The conflict is clear, irreconcilable, and deeply entrenched, and nothing would be gained by further percolation. The importance of the issue is underlined by the number of cases in which it has arisen and is likely to arise in the future.

This case offers an appropriate vehicle for reaching the crucial question whether notice of *Garrity* immunity is required. Because petitioners received no notice of their *Garrity* rights, there is no fact-sensitive dispute whether notice was sufficient. Petitioners' claim of a Fifth Amendment violation stands or falls entirely on whether they were entitled to some sort of notice of their *Garrity* rights. If this Court were to find that they had no such entitlement, their claim would fail. But if notice was required, then they could not constitutionally be punished for refusing to cooperate with their public employer's internal investigation.

Because this case squarely presents a recurring issue of fundamental importance, in a manner fit for resolution by this Court, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–35a) is reported at 510 F.3d 1161. The opinion of the district court (App. 36a–85a) is reported at 394 F. Supp. 2d 1203.

JURISDICTION

The court of appeals entered its judgment on December 27, 2007, and denied a timely petition for rehearing on February 12, 2008. App. 86a. On May 7, Justice Kennedy extended the time to file a

petition for certiorari until June 11, 2008. App. 89a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

STATEMENT

A. Facts

In the early morning hours of September 5, 2002, petitioners, four deputies of the Los Angles County Sheriff's Department (the "Department"), participated in a narcotics investigation during their patrol shift. 1 E.R. 11.[1] At the scene, Martin Flores, a visibly intoxicated bystander, interfered with the investigation. 4 E.R. 1070–71. When requested to leave the scene, Flores asked petitioners to arrest him so he would have somewhere to sleep. *Id.* at 1067. Shortly thereafter, Flores called the Los Angeles Police Department ("LAPD") and claimed that a male deputy, possibly Hispanic, had struck him with a flashlight in the back and head. App. 39a.

The Department's Internal Affairs Bureau ("IAB") promptly initiated an investigation. App. 40a. The Department has two separate investigation units: The IAB investigates only administrative allegations, and the Internal Criminal Investigations Bureau ("ICIB") investigates only criminal allegations. App. 41a. At the end of their shift, petitioners were told to return to the East Los Angeles Station and remain until interviewed and released by the IAB investiga-

[1] "E.R." citations are to the appellants' Excerpts of Record in the court of appeals.

tors. *Id.* After interviewing Flores at the hospital, IAB investigators decided that the ICIB should become involved. *Id.* Petitioners were advised that the matter had been turned over to the ICIB to investigate criminal allegations against them. App. 3a.

Petitioners were called to the office of Captain Thomas Angel, the Station's Commanding Officer. App. 43a. He announced in a harsh, accusatory manner that he believed that one of the deputies had used excessive force on Flores, that the others were covering up, and that one or more of them could be criminally prosecuted or fired. App. 43a–44a. Captain Angel told petitioners that the only way to avoid criminal charges was to "come forward now," which they understood to mean to give an immediate and voluntary statement to the ICIB investigators without any protection against later use of such statements against them. *Id.* Captain Angel ordered petitioners not to leave the station until after they were interviewed by the ICIB. *Id.*

The lead ICIB investigator on the case, Sergeant Russell Kagy, interviewed each petitioner individually. App. 45a. He advised petitioners that, although they were not yet formally considered suspects, they could not be eliminated as suspects either. App. 5a. Sergeant Kagy asked petitioners to provide statements. Asserting their rights under the Fifth Amendment, they declined to testify. *Id.*

Upon returning to work the next day, petitioners were reassigned from street patrol duties to station duties.[2] App. 6a. Petitioners were told that Captain

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[2] Petitioners were asked to waive the five-day notice requirement for a schedule change, but they declined. Their schedules were nevertheless changed immediately. 3 E.R. 749–56. Sergeant Burke and Deputy Joseph Carrillo, who were also under

Angel ordered the reassignments because they had refused to provide statements to the ICIB. 1 E.R. 14–15. As a result of the reassignments, they suffered personal financial hardship through decreased opportunities for earning overtime and lost valuable field experience. *E.g.*, 1 E.R. 15. In addition, Deputy Aguilera was denied two promotions,[3] each with a corresponding 5% increase in pay, because she was not permitted to work in the field. *Id.* at 15–16. As a result of being removed from patrol duty, Deputy Arellano, who was in his last month of patrol training, was unable to complete his training and receive a corresponding salary increase. 2 E.R. 546.

While petitioners remained on station duty, Sergeant Kagy and the ICIB coordinated with prosecutors to continue the investigation. App. 6a–7a. In August 2003, the ICIB submitted the case investigation report to the District Attorney's Office to consider filing criminal charges. App. 7a. In September 2003, the District Attorney's Office requested compelled statements from Deputies Aguilera, Ramirez, and Arellano. *Id.* Within days of providing compelled statements, the three were cleared by their supervisors and restored to their pre-investigation street patrol assignments. *Id.* Deputy Bardon was

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ICIB investigation, were similarly reassigned, but they returned to patrol duties immediately after waiving their Fifth Amendment rights and providing voluntary statements. 1 E.R. 16–17.

[3] Deputy Aguilera was told that, although she was highest on the list of available candidates for a promotion to Narcotics Investigator, she was not chosen because of Captain Angel's intervention. She was also advised that she had been chosen for a position in the Major Crimes Bureau, but again could not take the position as a result of her superiors' intervention. 1 E.R. 16; 2 E.R. 539.

never interviewed or reassigned to patrol duties before his retirement from the Department in December 2004. 3 E.R. 778.

B. Legal Background

The Fifth Amendment, applicable to the States under the Fourteenth Amendment, privileges a witness from answering questions in any "proceeding, civil or criminal, formal or informal," when the answers might tend to incriminate the witness in future criminal proceedings. *E.g.*, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Despite this privilege, a witness may be compelled to testify when granted "use immunity," i.e., immunity from the testimony's subsequent use and derivative use in a future criminal proceeding. *E.g.*, *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

This Court clarified the application of these principles in the public employment context in a line of cases beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967), which established that public employees' compelled statements cannot be used against them in criminal proceedings. But public employers may still compel employees to cooperate in employment-related investigations so long as their Fifth Amendment rights are protected. In *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court held that a public employee could not be punished for asserting his Fifth Amendment rights but declared in dicta that with use immunity he could have been punished if he "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties." *Id.* at 278; *see also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968).

In *Lefkowitz v. Turley*, this Court elaborated somewhat on the immunity that is required before a public employer may compel testimony:

> [T]he accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity .... [G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. ... [I]f answers are to be required ... States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee ... waive such immunity.

414 U.S. at 84–85.

This Court, however, has never explained how "States must offer to the witness whatever immunity is required." *Id.* at 85. Under this Court's decisions, at least four[4] possible avenues to immunity might protect employees' Fifth Amendment rights sufficiently to permit a public employer to compel testimony (or punish employees who refuse to testify). The opinions leave open the possibility that a public employer's ability to compel testimony (or punish silence) could be limited to one of the following circumstances:

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[4] Prof. Warnken identified three of these possibilities in his article on the subject. *See* Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 482 (1987). The fourth has been recognized in subsequent cases.

(1) only if the government has expressly granted immunity to the employee;

(2) only if the employer explicitly notifies the employee that (a) the testimony is being compelled, (b) under *Garrity*, the compelled testimony cannot be used in a subsequent criminal proceeding, and (c) it may administratively punish the employee if he or she fails to testify;

(3) whenever the totality of the circumstances indicate that the employee objectively should have known of his or her "*Garrity* immunity" rights, even in the absence of an express grant or explicit notice; or

(4) in any circumstance—because *Garrity* immunity attaches automatically upon the compulsion to answer—so long as the employer does not demand that the employee waive his or her *Garrity* immunity.

Judge Friendly adopted alternative (2)—requiring explicit *Garrity* notice—in a detailed opinion for the Second Circuit on remand from this Court's *Uniformed Sanitation Men* decision. *See Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970). Two other circuits and several state supreme courts agree with that analysis. The First Circuit follows alternative (3)—holding employees to an objective standard under the totality of the circumstances. And the Ninth Circuit has now joined two other circuits and several state supreme courts in adopting alternative (4)—rejecting the notice requirement and finding a constitutional violation only upon compelled testimony coupled with compelled waiver.

C. Proceedings Below

Petitioners brought this action in the Central District of California, alleging that respondents violated their Fifth Amendment rights by punishing them (through adverse employment actions) for failing to provide statements in the criminal investigation of the alleged assault.[5] In granting respondents' motion for summary judgment, the district court held that an employer violates the Fifth Amendment "'only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers.'" App. 68a (quoting *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998)) (emphasis added by district court).

On appeal, a divided panel of the Ninth Circuit affirmed. The majority—following the Eighth Circuit's decision in *Hill*—held that petitioners' Fifth Amendment rights were not violated, despite the adverse employment actions, because they were not forced to waive immunity from prosecution on the basis of their responses. App. 18a–19a, 20a n.6. The majority reasoned that "*Gardner* does not require . . . that a public employer must expressly inform an employee that his statements regarding actions within the course and scope of his employment cannot be used against him in a criminal proceeding before taking administrative action against that employee." App. 20a n.6. In reaching this conclusion, the majority expressly rejected the "bright-line rule" that had been "adopted by the Second, Seventh, and Federal Circuits." *Id.*

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[5] Petitioners also alleged violations of their Fourth and Fourteenth Amendment rights. They do not pursue those claims here.

Chief Judge Kozinski, dissenting on this issue, criticized the majority for "adopt[ing] the harsh and unfair rule of the Fifth and Eighth Circuits." App. 30a. He rejected the majority's analysis because "[w]e can't expect public employees who are pressured to give a statement to know that they have immunity." App. 32a. He argued that "the only constitutionally permissible rule" is that of the Second, Seventh, and Federal Circuits: "if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak." App. 30a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN ENTRENCHED CONFLICT ON A FIFTH AMENDMENT ISSUE OF FUNDAMENTAL IMPORTANCE

This Court has never fully explained the mechanism by which public employers offer the immunity required to compel employees to make potentially incriminating statements, or how public employees' constitutional rights must be protected in the complicated interaction between the public employers' need to elicit information related to employment and public employees' constitutional right not to incriminate themselves. In the absence of any guidance, the courts of appeals are irreconcilably split among three divergent positions: The Second, Seventh, and Federal Circuits hold that public employers must affirmatively notify employees of their *Garrity* rights so that the employees can make informed decisions. In sharp contrast, the Fifth and Eighth Circuits, now joined by the Ninth Circuit, hold that any compelled statement automatically attracts *Garrity* immunity

and that employers therefore need do nothing further to supply immunity or counsel employees regarding the consequences of their choices. These circuits hold that the Fifth Amendment is violated only when employers compel testimony and require employees to waive their immunity. Rejecting both bright-line rules, the First Circuit has adopted a case-by-case analysis to determine whether employees can be charged with notice of their *Garrity* immunity.

These alternative legal standards do not co-exist harmoniously. Rather, public employees face different consequences for the same choices and public employers face different legal obligations. The existence of these radically different alternatives creates an untenable patchwork in the legal landscape that defines a fundamental constitutional right.

The conflict is well-recognized in the lower courts. Indeed, it is explicitly acknowledged and discussed in both majority and dissenting opinions in multiple circuits. Moreover, the conflicting positions are so entrenched that further percolation would not resolve the conflict. This Court should grant review now and provide guidance on this fundamental issue.

A. The Second, Seventh, And Federal Circuits And At Least Five State Supreme Courts Require A "*Garrity* Notice" Before A Public Employer May Compel An Employee's Testimony Or Punish An Employee For Refusing To Testify

The "*Garrity* notice" approach to interrogation of public employees recognizes that coercion will often be implicit and that in the absence of notice employees will be confused about their rights. As Judge Posner explained:

> Our rule is perhaps best understood as an anti-mousetrapping rule. Uncounselled persons are much more likely to know about their "Fifth Amendment" right than they are to know about an immunity that qualifies the right. Asked to give answers to questions put to them in the course of an investigation of their arguably criminal conduct, they may instinctively "take the Fifth" and by doing so unknowingly set themselves up to be fired without recourse.

Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). The Second, Seventh, and Federal Circuits, along with at least five state supreme courts, therefore require a public employer to inform employees of their rights—giving what might be called a *Garrity* notice—before it may compel an employee's testimony or punish an employee for refusing to testify. No single formula is necessary to satisfy the requirement, but the rules in all of these jurisdictions are substantially the same.

The origin of the *Garrity* notice requirement can be traced to the final sentence of this Court's opinion in *Uniformed Sanitation Men*, which declared that "petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings*, which do not involve an attempt to coerce them to relinquish their constitutional rights." 392 U.S. at 285 (emphasis added).

On remand in *Uniformed Sanitation Men*, in an opinion by Judge Friendly, the Second Circuit held that "'[a]fter proper proceedings' means proceedings, such as those held here, in which the employee is asked only pertinent questions about the perform-

ance of his duties and is duly advised of his options and the consequences of his choice." 426 F.2d at 627. Thus, the *Garrity* notice requirement was satisfied because the employer notified the employees that they "may be subject to disciplinary action . . . for the failure to answer material and relevant questions relating to the performance of [their] duties" and that their answers "may not be used against [them] in a criminal proceeding." *Id.* at 621.[6]

A year later, the Seventh Circuit—citing Judge Friendly's analysis—adopted substantially the same rule:

> [A] public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, *i.e.*, that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.

Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973). The Seventh Circuit has reaffirmed the rule several times, most recently in *Franklin v. City of Evanston*, 384 F.3d 838, 844–45 (7th Cir.

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[6] On a hyper-technical level, this statement could be viewed as dictum because the court held that the employees had been properly discharged. Under the circumstances, however, Judge Friendly's explanation clearly states the rule in the Second Circuit. This Court had just held that these same employees could not be discharged when no *Garrity* notice had been given. The one factual change and Judge Friendly's sole rationale for the different result was that a *Garrity* notice had been given in the meantime.

2004) (reversing the dismissal of public employee who had received no *Garrity* notice).

The Federal Circuit[7] traces its rule to *Kalkines v. United States*, 473 F.2d 1391, 1393–94 (Ct. Cl. 1973), a Court of Claims decision that quoted Judge Friendly's language and adopted his analysis to reverse the discharge of a federal employee who had received no *Garrity* notice. Since its creation in 1982, the Federal Circuit has consistently reaffirmed the rule initially adopted by its predecessor court. *See, e.g., Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1350–53 (Fed. Cir. 2001); *Weston v. U.S. Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983).

In addition to these three federal circuits, the highest courts of at least five states have adopted substantially the same rule.[8] The Wisconsin Supreme Court, for example, reversing the dismissal of two police officers who had not received a *Garrity* notice, adopted the Seventh Circuit's rule as announced in *Conlisk*, 489 F.2d at 894. *See Oddsen v. Board of Fire & Police Comm'rs*, 108 Wis.2d 143, 163–65, 321 N.W.2d 161, 172–73 (1982).

Similarly, the Massachusetts Supreme Judicial Court, reversing punishments imposed on an officer

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[7] "Because . . . most petitions for review of a final order of the Merit Systems Protection Board are filed in the Federal Circuit . . . , close consideration of that court's approach in *Garrity* cases is instructive." *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 510 n.24 (1st Cir. 2007) (Stahl, J., dissenting), *cert. denied*, 128 S. Ct. 1924 (2008).

[8] In addition, some state supreme courts have upheld disciplinary actions against public employees and noted that *Garrity* notices had been given but have not clarified whether a *Garrity* notice is a necessary precondition for punishment. *See, e.g., In re Waterman*, 910 A.2d 1175, 1179–80 (N.H. 2006).

who had received no *Garrity* notice, explained that "public employers . . . must specify to the employee the precise repercussions (i.e., suspension, discharge, or the exact form of discipline) that will result if the employee fails to respond." *Carney v. City of Springfield*, 403 Mass. 604, 609, 532 N.E.2d 631, 635 (1988) (citing *Kalkines*, 473 F.2d at 1393).

In *Gandy v. State ex rel. Division of Investigation & Narcotics*, 96 Nev. 281, 284, 607 P.2d 581, 583–84 (1980), the Nevada Supreme Court reversed the dismissal of an officer, following *Kalkines* and Judge Friendly's interpretation of "proper proceedings" in *Uniformed Sanitation Men*, 426 F.2d at 627. *Gandy* adopted a rule requiring *Garrity* notice.

In a detailed opinion considering exactly what is required in a *Garrity* notice, the Ohio Supreme Court announced substantially the same rule:

> [A] police officer may be dismissed for just cause . . . when he or she refuses to obey a superior's reasonable order to take a polygraph test, so long as the officer has been informed as part of such order (1) of the subject of the intended inquiry, which is specifically and narrowly related to the performance of the officer's official duties, (2) that the officer's answers cannot be used against him or her in any subsequent criminal prosecution, and (3) that the penalty for such is dismissal.

City of Warrensville Heights v. Jennings, 58 Ohio St.3d 206, 210, 569 N.E.2d 489, 494 (1991). *See also Seattle Police Officers' Guild v. City of Seattle*, 80 Wash.2d 307, 316, 494 P.2d 485, 490–91 (1972) (permitting testimony to be compelled because officers would receive *Garrity* notice).

B. The Fifth, Eighth, And Ninth Circuits Reject The *Garrity* Notice Rule And Hold That No Constitutional Violation Occurs Unless The Employee Is Forced To Waive Immunity

The Fifth, Eighth, and Ninth Circuits hold that—because *Garrity* immunity attaches whenever public employees are compelled to answer questions in a job-related investigation regardless whether they were informed of their rights—employees may be administratively punished for remaining silent in the face of compulsion, despite a mistaken belief that answers may be used in subsequent criminal proceedings. A constitutional violation occurs in these circuits only if the employer requires the employee to waive immunity.

The Fifth Circuit clearly states this position:

> [I]t is the compelled answer in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee. It is a discharge predicated on the employee's refusal to waive immunity which is forbidden . . . , not a discharge based on refusal to answer where there is no demand by the employer of the relinquishment of the constitutional right.

Gulden v. McCorkle, 680 F.2d 1070, 1074 (5th Cir. 1982); *see also Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir. 1992) (reaffirming and applying *Gulden* rule).

The Eighth Circuit applies the same standard. *See Hill*, 160 F.3d at 471–72 (following *Gulden*). According to the *Hill* court, "the mere failure affirmatively to offer immunity" is not impermissible. *Id.* at 471. "The Fifth Amendment is violated only by the

combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers." *Id.*

The court below adopted the same approach for the Ninth Circuit: "[T]he Constitution is offended not when an officer is compelled to answer job-related questions, but only when the officer is required to waive his privilege against self incrimination while answering legitimate job-related questions." App. 18a n.5. Even if the officer remains silent because he believes that any statements made can be used against him criminally, he may be punished as long as the government has not actively created that belief. *See id.* ("Indeed, the deputies were not *asked* to waive their immunity.") (emphasis added).

At least three state high courts also reject the *Garrity* notice rule and hold that a constitutional violation occurs only when public employees are asked to waive their *Garrity* immunity. *See Debnam v. North Carolina Dep't of Correction*, 334 N.C. 380, 388–89, 432 S.E.2d 324, 330 (1993) (adopting Fifth Circuit rule; rejecting decisions of Second, Seventh, and Federal Circuits); *In re Matt*, 71 N.Y.2d 154, 162, 518 N.E.2d 1172, 1176 (1987) (because "immunity . . . flows directly from the Constitution, . . . the State was not obligated to inform [its employee] that immunity attached before ordering him to answer questions"); *State Dep't of Correctional Servs. v. Gallagher*, 214 Neb. 487, 494, 334 N.W.2d 458, 462–63 (1983) (following *Gulden*).

C. The First Circuit Rejects The *Garrity* Notice Rule In Favor Of A Fact-Based Standard For Determining When Public Employees Can Reasonably Be Said To Have Notice Of Their *Garrity* Rights

The First Circuit rejects both the bright-line rule followed in the *Garrity* notice circuits and the harsh bright-line rule (adopted by the majority below) that no notice is necessary. It instead makes a case-by-case determination whether, under the totality of the circumstances, employees have adequate notice of their *Garrity* rights.

In *Sher v. U.S. Department of Veterans Affairs*, the First Circuit considered the circuit split regarding when, if ever, *Garrity* notice must be given. 488 F.3d at 502–05. Although the employee had received no explicit *Garrity* notice, the court concluded that on the totality of the circumstances—particularly the presence of counsel at the employee's questioning, *id.* at 505—he could be charged with adequate notice of his *Garrity* rights. The government was accordingly justified in disciplining him.

D. Further Confusion Is Evidenced By Those Courts That Have Faced The Issue Without Adopting A Clear Rule

The Eleventh Circuit has decided several cases implicating the issues raised here, but it has not adopted a clear rule. In *Benjamin v. City of Montgomery*, 785 F.2d 959 (11th Cir. 1986), for example, it declared that "we cannot require public employees to speculate whether their statements will later be excluded under *Garrity*," *id.* at 962, thus suggesting that a *Garrity* notice might be required. *See also, e.g., United States v. Vangates*, 287 F.3d 1315, 1322 (11th Cir. 2002) (explaining that the court examines

the employee's subjective belief "and, more importantly, the objective circumstances surrounding it"); *id.* ("we examine (as we must) the totality of the circumstances"). But in other cases the court has appeared to base its analysis on Fifth Circuit decisions rejecting a *Garrity* notice requirement. *See, e.g., Harrison v. Wille*, 132 F.3d 679, 682–83 (11th Cir. 1998) (per curiam) (following *Arrington* analysis).

Several other courts of appeals have also touched on the issue but for one reason or another failed to announce a definitive rule. *See, e.g., Fraternal Order of Police v. City of Philadelphia*, 859 F.2d 276, 282 (3d Cir. 1988) ("Although we recognize the importance of the issue, we find it unnecessary to decide whether a public employer must inform employees [of their *Garrity* rights] when the employee is required, on pain of dismissal, to answer the questions."); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n.7 (4th Cir. 1995) ("In an appropriate case, it might be necessary to inform an employee about [*Garrity*'s] nature and scope.") (citing Seventh Circuit's rule); *Stover v. United States*, 40 F.3d 1096, 1102 n.5 (10th Cir. 1994) ("this case does not require us to decide whether the government must affirmatively advise [an employee of *Garrity* rights]").

Although these circuits are not part of the direct conflict, they nevertheless help demonstrate the confusion that exists in the lower courts and illustrate why this Court's guidance is essential.

E. The Conflict Is Irreconcilable, Acknowledged By Lower Courts, And Deeply Entrenched

The conflict among the respective approaches is clear and irreconcilable. If petitioners' case had

arisen in the Second, Seventh, or Federal Circuits or in five other states, their punishments would not have withstood constitutional scrutiny. They would have prevailed on this issue, just as similarly situated public employees succeeded in those circuits and state supreme courts. *See, e.g.*, *Franklin*, 384 F.3d at 844–45; *Modrowski*, 252 F.3d at 1350–53; *Conlisk*, 489 F.2d at 894; *Kalkines*, 473 F.2d at 1393–94; *Oddsen*, 108 Wis.2d at 163–65, 321 N.W.2d at 172–73; *Carney*, 403 Mass. at 609, 532 N.E.2d at 635; *Gandy*, 96 Nev. at 284, 607 P.2d at 583–84.

Even if petitioners' case had arisen in the First Circuit, they would have prevailed, for there is no evidence that petitioners had adequate notice of their *Garrity* rights. Indeed, all of the evidence suggests that the Department sought to obtain petitioners' voluntary (non-immunized) statements until the time that it finally compelled testimony from three of them.

The lower courts have widely acknowledged the present conflict. In the court below, both the majority (App. 19a–20a n.6) and the dissent (App. 30a & n.10) noted the conflict. Seven months earlier, both the *Sher* majority and the dissent discussed the conflict. *See* 488 F.3d at 503–04 ("[t]he circuits have taken different approaches"); *id.* at 509–11 (dissent) (identifying 3-3 circuit split). Judge Posner acknowledged that the Seventh Circuit's rule "has been rejected in two circuits." *Atwell*, 286 F.3d at 990 (citing *Hill* and *Gulden*). Indeed, even courts that have not yet adopted a position recognize this conflict. *See Fraternal Order of Police*, 859 F.2d at 282 (noting Second, Fifth, Seventh, and Eleventh Circuits' different positions).

The conflict is so deeply entrenched that nothing would be gained by further percolation. The lower

courts have had several decades and numerous opportunities to consider the proper application of *Garrity* and its progeny, but on both sides of the conflict they have simply reaffirmed their earlier positions. *See, e.g.*, *Franklin*, 384 F.3d at 844–45 (reaffirming *Atwell*); *Atwell*, 286 F.3d at 990 (reaffirming three earlier Seventh Circuit decisions); *Arrington*, 970 F.2d at 1446 (reaffirming *Gulden*). The First and Ninth Circuits addressed the issue most recently and adopted differing positions (both over vigorous dissents) after full consideration of the conflicting views. There is no reason to believe that any of the lower courts are likely to change their position without this Court's intervention, and there is no evidence that the lower courts are moving closer together. To the contrary, they are demonstrably moving further apart and deepening the conflict.

II. THE COURT BELOW ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE PETITIONERS' FIFTH AMENDMENT RIGHTS

This Court should also grant review because the Ninth Circuit's decision is inconsistent with this Court's Fifth Amendment jurisprudence. As Chief Judge Kozinski explained in his dissent, "the only constitutionally permissible rule" is to require the government to clarify the consequences of testifying before it can punish an employee for failing to do so. App. 30a.

A. By Not Either Expressly Compelling Petitioners To Speak Or Granting Them Immunity, Respondents Deprived Petitioners Of Their Fifth Amendment Rights

The Ninth Circuit's decision is premised on the view that respondents did not violate petitioners'

Fifth Amendment rights because they "were not compelled to answer the investigator's questions or to waive their immunity." App. 18a. The notion that there is no constitutional violation when public employees threatened with administrative and criminal action are penalized for exercising their Fifth Amendment right against self-incrimination is contrary to this Court's cases.

The Court's cases make clear that public employees must be assured of immunity before losing the right to remain silent. *See Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (one who asserts the privilege "'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding.") (quoting *Maness v. Meyers*, 419 U.S. 449, 473 (1976) (White, J., concurring in result)) (emphasis added in *Maness*); *see also Turley*, 414 U.S. at 78 ("a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers") (citing *Kastigar*).

Here, ICIB investigators in a criminal investigation sought voluntary, non-immunized statements for a full year. By not expressly compelling petitioners to give statements, they hoped to obtain incriminating information without triggering *Garrity* immunity. At the very least, petitioners reasonably feared that any statements might be used against them in a criminal prosecution, and thus they had a rational basis for remaining silent. If petitioners' fears had been unreasonable, respondents could easily have dispelled the ambiguity (as they ultimately did after a year when three petitioners were expressly

compelled to testify). In the meantime, respondents deliberately forced petitioners into a Hobson's choice—and then penalized them for invoking their Fifth Amendment rights.

A rule requiring *Garrity* notice would remedy the constitutional violation by preventing employees from mistakenly asserting their Fifth Amendment rights against self-incrimination and facing adverse employment consequences as a result. The Ninth Circuit relied on petitioners' law enforcement experience and "familiarity with . . . the Department's procedures for placing suspects under arrest" to suggest that they should have understood the benefit of *Garrity* immunity. App. 20a n.6. But that argument assumes they knew their testimony was compelled, when every indication was to the contrary. Moreover, even experienced law enforcement officers—even the experienced chief judge of the nation's largest federal circuit, *see* App. 32a—"are much more likely to know about their 'Fifth Amendment' right than they are to know about an immunity that qualifies the right." *Atwell*, 286 F.3d at 990. The logic of *Garrity* immunity is quite different and likely will not be intuitive even to law enforcement officers familiar with placing criminal suspects under arrest, advising them that they have the right to remain silent, and warning them that "anything said can and will be used" against them, *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). Under *Garrity*, public employees do *not* have the right to remain silent because anything they say *cannot* be used against them.

The ease of providing notice is demonstrated by FBI procedures. *See United States v. Friedrick*, 842 F.2d 382, 385 (D.C. Cir. 1988). FBI regulations pro-

vide that FBI employees are to be presented with either of two forms when they are interviewed. One is captioned "Warning and Assurance To Employee Requested To Provide Information On a Voluntary Basis." *Id.* It "indicates to the prospective interviewee that his statement is voluntary and that his refusal to answer questions *cannot* result in adverse employment action." *Id.* It continues, "the Government is free to use any statements by the employee against him in any subsequent criminal prosecution or agency disciplinary proceeding." *Id.* The other form is captioned "Warning and Assurance To Employee Required To Provide Information." *Id.* Under this form, "the FBI may require an employee to provide information, and it may visit sanctions upon an employee, including dismissal if he refuses to submit to questioning. Since [the form] procedures are *compulsory*, the Government may not use an employee's statements against him in any subsequent criminal prosecution." *Id.*

B. Petitioners' Reassignment From Street Patrol Duty To Station Duty Was An Unconstitutional Consequence Of Their Invocation Of Their Fifth Amendment Rights

The majority below suggested that petitioners had not been subject to unconstitutional retaliation because it did "not consider re-assignment from field to desk duty as equivalent to losing one's job under *Gardner*." App. 20a. But this Court and several federal circuits have recognized that improper sanctions less severe than employment termination are still unconstitutional. In *Turley*, for example, architects were disqualified from bidding on state contracts, thus losing a possibility for future profits, 414 U.S.

at 77—much as petitioners' future prospects were damaged here. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the penalty (loss of an unpaid position) did not involve an economic impact, but this Court held that "direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids." *Id.* at 806. *See also, e.g., id.* at 805 ("[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right."); *McKinley v. Mansfield*, 404 F.3d 418, 436 n.20 (6th Cir. 2005) ("although job termination is surely a 'substantial penalty,'" for purposes of proving compulsion, "so, too, are other employer actions, such as ordering a demotion or suspension").

The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Department polices allow for reassignment of deputies to less desirable duties (with notice that was not given here, *see supra* note 2). But they may not impose reassignment as a penalty for exercising constitutional rights. Petitioners were reassigned to station duties the day after asserting their Fifth Amendment rights. Three were reinstated to their original patrol assignments within days of providing compelled statements. Two colleagues were reinstated immediately after waiving their Fifth Amendment rights and providing voluntary statements. *See supra* note 2. The timing of these reassignments and reinstatements shows that respondents were attempting to coerce petitioners into making "voluntary," non-immunized statements, or at least punish them for failing to do so.

The penalties at issue here were undoubtedly substantial. Petitioners lost the opportunity to earn overtime pay, scheduled promotions, and pay increases. It is irrelevant that these benefits had been expected but not guaranteed. *See Cunningham*, 431 U.S. at 807 ("[W]e must take into account potential economic benefits realistically likely of attainment. Prudent persons weigh heavily such legally unenforceable prospects in making decisions; to that extent, removal of those prospects constitutes economic coercion."); *Turley*, 414 U.S. at 84 ("A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage."); *Click v. Copeland*, 970 F.2d 106, 110 (5th Cir. 1992) (although pay was not reduced, deputies' transfers from law enforcement to jail guard positions treated as demotions for purposes of 42 U.S.C. § 1983).

The harm to petitioners' reputations as law enforcement officers also constituted coercion. This Court has recognized that loss of prestige is a sufficient penalty to violate the Fifth Amendment. *See Cunningham*, 431 U.S. at 807 (the threatened loss of "widely sought" political positions, "with their power and perquisites, is inherently coercive"; "[a]dditionally, compelled forfeiture of these posts diminishes [one's] general reputation in his community"); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) ("The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion.").

C. Petitioners' Fifth Amendment Rights Were Violated Even Though They Were Never Charged With A Crime

The majority below also declared that petitioners' "Fifth Amendment claim also fails because [they] were never charged with a crime, and no incriminating use of their statements has ever been made." App. 21a. That illogical conclusion is based on an improper application of this Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). *Chavez* held that, if a criminal suspect is coerced to speak, "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Id.* at 769 (plurality opinion). But *Chavez* applies only if the suspect actually made a statement, and the violation occurs when the statement is used in a subsequent criminal proceeding. Being penalized for asserting Fifth Amendment rights, without assurance of immunity, as petitioners were here, is a distinct constitutional violation. As Chief Judge Kozinski explained, App. 32a–33a, *Chavez* is irrelevant—except to the extent that the *Chavez* Court recognized that the government can neither "penalize public employees . . . to induce them to waive their *immunity*, 538 U.S. at 768 n.2, nor "condition public employment on the waiver of constitutional rights," *id.* at 769 n.2.

III. WHETHER *GARRITY* NOTICE IS REQUIRED IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

In addition to the general importance of clarifying the Fifth Amendment privilege against self-incrimination, resolving the currently entrenched split—deepened by the Ninth Circuit's decision

below—is important to public employees, who lack certainty as to the scope of their Fifth Amendment rights; to public employers, whose conduct of internal investigations is burdened by the current conflict; and to the public at large.

The problem is particularly acute in those jurisdictions in which the state and federal courts adopt conflicting rules. The decision below, for example, conflicts with decisions of two state supreme courts within the Ninth Circuit. *See Gandy*, 96 Nev. at 284, 607 P.2d at 583–84; *Seattle Police Officers' Guild*, 80 Wash.2d at 316, 494 P.2d at 490–91; *compare, e.g.*, *Uniformed Sanitation Men*, 426 F.2d at 627 (adopting *Garrity* notice rule); and *Carney*, 403 Mass. at 609, 532 N.E.2d at 635 (same), *with Matt*, 71 N.Y.2d at 162, 518 N.E.2d at 1176 (rejecting *Garrity* notice rule); and *Sher*, 488 F.3d at 502–05 (same).

A. Resolving The *Garrity* Notice Issue Is Important To Public Employees

Without a bright-line rule requiring an employer to give a *Garrity* notice, tens of thousands[9] of public employees involved in internal investigations each year are subject to *Garrity*'s opacity. They face intractable choices that *Garrity* was supposed to correct—the threat of criminal prosecution based on their testimony and the threat of employment sanc-

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[9] In 2002, law enforcement agencies employing 100 or more officers received 26,556 citizen complaints. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf. Each complaint would require interviewing one or more employees who have been accused of wrongdoing. And of course the issue also arises outside the law enforcement context. *See, e.g.*, *Uniformed Sanitation Men*; *Sher*; *Atwell*; *Kalkines*.

tions for their silence. *See* 385 U.S. at 498; *see also, e.g.*, *Sher*, 488 F.3d at 511 (Stahl, J., dissenting). They are left "uninformed and guessing as to how their statements may be used, what their constitutional rights are, and how to respond to ambiguous requests for statements." *Hill*, 160 F.3d at 473 (Heaney, J., dissenting). Employers, in contrast, focus their understanding of when *Garrity* is triggered on whether they explicitly compel employees to answer questions.[10]

Requiring employer clarification is particularly appropriate because the nature of *Garrity*'s protection is so counterintuitive. In an age when even children recite *Miranda* warnings, public employees may justifiably expect any statement they make "can and will be used against [them]," *Miranda*, 384 U.S. at 469, and therefore mistakenly "plead the Fifth" when interrogated. *See Atwell*, 286 F.3d at 990; *Sher*, 488 F.3d at 511 (Stahl, J., dissenting); App. 32a (Kozinski, C.J., dissenting). Permitting public employers to punish this mistaken assertion exacerbates the uncertainty *Garrity* was intended to elimi-

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[10] *See, e.g.*, 1 L.A. POLICE DEP'T, MANUAL § 210.47 (2007) ("Under . . . federal law, any testimony or statement made by an officer under administrative compulsion of this policy cannot be used against that officer in any pending or future criminal prosecution."); Michael E. Brooks, *Statements Compelled from Law Enforcement Employees*, 71 FBI L. ENFORCEMENT BULL. 26, 31 (2002) ("While . . . investigators must be careful to avoid 'compelling' a subject to provide information when criminal prosecution is contemplated . . . they still have significant power to encourage cooperation by all law enforcement employees."), *available at* http://www.fbi.gov/publications/leb/2002/june021eb.pdf; Randy Rider, Garrity—*How it Works*, OFFICER.COM, Feb. 28, 2007 (*Garrity* is triggered only if a statement is compelled), http://www.officer.com/web/online/Investigation/Garrity--How-It-Works/18$35064.

nate. Resolving the intolerable conflict is exceptionally important to dispel public employees' confusion regarding their Fifth Amendment right against self-incrimination.

B. Resolving The *Garrity* Notice Issue Is Important To Public Employers

In 2002, large law enforcement agencies fielded more than 25,000 citizen complaints, but only 8% of them involved sufficient evidence to justify disciplinary action. *See* HICKMAN, *supra* note 9, at 1. Los Angeles County alone averages 4,128 investigations per year of its more than 95,000 public employees, a large portion of whom are employed in law enforcement.[11] In separating the wheat from the chaff, investigators continually risk sabotaging criminal prosecutions before they begin if *Garrity* immunity attaches when investigators did not intend to compel a statement. Recognizing this problem, the Justice Department's Civil Rights Division has repeatedly exhorted local law enforcement agencies to establish "guidelines regarding when to compel statements pursuant to *Garrity*."[12] But the entrenched conflict over *Garrity*'s application demonstrates the persis-

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[11] Application for County of Los Angeles for Leave to File Amicus Curiae Brief at 1, *Spielbauer v. County of Santa Clara*, No. S150402 (Cal. filed Sept. 14, 2007).

[12] Letter from Civil Rights Division, U.S. Dep't of Justice, to Ruth Carter, City of Detroit Corporation Counsel, Re: Investigation of the Detroit Police Department (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm. For similar letters regarding other departments, see, e.g.:

http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf;
http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf;
http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf.

tent difficulty facing law enforcement agencies in navigating "between the grey legal waters of *Garrity* and compelled information and the potential contamination of a criminal case with compelled information"[13] and impedes such agencies from developing effective investigatory protocols.

A rule requiring *Garrity* notice also benefits public employers because it allows supervisors and investigators to conduct effective internal investigations and it protects them from inadvertently immunizing statements and hampering criminal prosecutions. Prosecutors ordinarily decide whether to grant immunity to potential witnesses. In internal investigations of public employees, however, *Garrity* immunity attaches automatically—without the prosecutor's involvement—when questioning reaches the level of "compulsion." Because compulsion is not clearly or consistently defined, investigators acting in good faith could inadvertently "compel" employees to speak, resulting in use immunity for any statements made. Requiring investigators to clarify the situation would ensure that investigators do not inadvertently interfere with prosecutorial interests.

C. Resolving The *Garrity* Notice Issue Is Important To The General Public

Well-publicized episodes of police brutality and corruption have damaged the public's trust in law enforcement agencies and have prompted public de-

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[13] Michael Merkow, Commanding Officer Prof'l Standards Bureau, L.A. Police Dep't, Keynote Address at the National Summit on Police Use of Force (Jan. 23, 2006), *in* REPORT: NATIONAL SUMMIT POLICE USE OF FORCE 16, 20 (Inst. for Law Enforcement Admin. 2006), *available at* http://www.cailaw.org/ilea/publications/National_Summit_Police_Use_Of_Force_Report06.pdf.

mands for increased oversight and transparency in internal investigations of police conduct. To restore the public's trust, various enforcement models have emerged, such as citizen review boards and separate internal investigative departments.[14] In many such models, every alleged instance of police excessive force must be investigated.[15]

The inability to establish a predictable protocol to investigate allegations of officer misconduct undermines the public's trust in law enforcement agencies for two reasons. First, any resources spent investigating the thousands of complaints under *Garrity*'s opaque standards diverts funds available for the general protection of the public. Such investigative efforts, which typically are high profile in any community, contribute to public distrust of law enforcement agencies' ability to enforce the law and protect the

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[14] *See, e.g.*, San Francisco Gov't: Office of Citizen Complaints, http://www.sfgov.org/site/occ_index.asp (citizen review board); Consent Decree § III, *United States v. City of Los Angeles*, No. 00-11769 GAF (C.D. Cal. June 15, 2001) [hereinafter LAPD Consent Decree] (independent internal affairs unit), *available at* http://www.usdoj.gov/crt/split/documents/laconsent.htm. *See also, e.g.*, Letter from Civil Rights Division, U.S. Dep't of Justice, to Stu Gallaher, Chief of Staff Office of the Mayor, Re: Department of Justice Investigation of the Easton Police Department 8 (Nov. 26, 2007) ("Having a well-run, independent internal affairs unit/personnel is critical for ensuring . . . [t]he integrity of the criminal investigation."), *available at* http://www.usdoj.gov/crt/split/documents/easton_talet_11-26-07.pdf.

[15] *See, e.g.*, S F., CAL., CHARTER art. IV, § 4.127 (2006) ("Complaints of police misconduct . . . shall be promptly, fairly and impartially investigated by staff of the Office of Citizen Complaints."), *available at* http://www.municode.com/Resources/gateway.asp?pid=14130&sid=5; LAPD Consent Decree, *supra* note 14, at § III.G.93 (requiring internal affairs unit to investigate all complaints that allege, inter alia, unauthorized use of force).

populace. Second, if the agencies do not expend more resources on investigations subject to the specter of *Garrity*'s uncertain application, then continued investigatory errors will result in an unacceptably low rate of criminal prosecutions. Failing successfully to prosecute otherwise sanctionable conduct will call law enforcement agencies' competence into question and likewise erode the public's trust. This Court's clarification of *Garrity*'s application is exceptionally important to provide a clear standard by which officer misconduct may efficiently and effectively be investigated, thus reinforcing public trust in law enforcement agencies.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ENTRENCHED CONFLICT AMONG THE LOWER COURTS

This case provides the necessary vehicle to resolve a long-standing and important conflict. The essential facts are undisputed. There is no question that petitioners faced the choices that *Garrity* abhors. As both the majority and the dissent below recognized, the established law of different circuits (and different states) mandates different conclusions on these facts regarding the legality of petitioners' punishment. No alternate holding exists to support the majority's decision.

This Court recently denied certiorari in *Sher v. U.S. Department of Veteran's Affairs* (No. 07-595), which presented a similar question for review. This case has none of the vehicle problems found there. The First Circuit expressly noted that its holding could be reached on alternate grounds, *Sher*, 488 F.3d at 506, which is not true here. The First Circuit charged Sher with constructive notice of his *Garrity* rights, *see id.* at 505–06, whereas the court below

held that notice was unnecessary. Unlike in *Sher*, the court below clearly reached, instead of avoiding, the broader doctrinal issues.

Because petitioners were denied any *Garrity* notice before being punished—much less the "proper proceedings" that this Court envisioned in *Uniformed Sanitation Men*, 392 U.S. at 285, and on which Judge Friendly established the *Garrity* notice requirement—the Court's resolution of the question dividing the circuits will either supply or deny relief. If this Court were to find that no *Garrity* notice is required, then petitioners' claims fail. But, if some notice was required, then they could not constitutionally be punished for refusing to testify. Thus, the case plainly presents the crucial question in a manner fit for resolution by this Court. The facts of petitioners' case do not obscure the question but rather place it in clear focus. The *Garrity* notice question is at the heart of this case. A decision would resolve nearly 40 years of confusion among the courts of appeals and state supreme courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 11, 2008

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56617

ELIZABETH AGUILERA; PHILLIP ARELLANO; BENJAMIN BARDON; GUSTAVO CARRILLO; HECTOR RAMIREZ,

Plaintiffs-Appellants,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES; WILLIAM STONICH, INDIVIDUALLY AND AS UNDER SHERIFF OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; LARRY WALDIE, INDIVIDUALLY AND AS ASSISTANT SHERIFF OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; WILLIAM MCSWEENEY, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; NEIL TYLER, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; THOMAS ANGEL, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ARTHUR NG, INDIVIDUALLY AND AS CAPTAIN OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ALAN SMITH, INDIVIDUALLY AND AS LIEUTENANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; MARGARET WAGNER, INDIVIDUALLY AND AS LIEUTENANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; RUSSELL KAGY, INDIVIDUALLY AND AS SERGEANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; BRIAN PROCTOR, INDIVIDUALLY AND AS SERGEANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; COUNTY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Defendants-Appellees.

Argued and Submitted July 10, 2007
Filed Dec. 27, 2007

Before: ALEX KOZINSKI, Chief Judge, ANDREW J. KLEINFELD, and RICHARD C. TALLMAN, Circuit Judges.

Opinion by Judge TALLMAN; Dissent by Chief Judge KOZINSKI.

TALLMAN, Circuit Judge:

Plaintiffs, various Los Angeles County sheriff's deputies, appeal an adverse summary judgment in favor of Sheriff Leroy Baca, the Sheriff's Department, other supervisory officers, and internal affairs investigators. The deputies allege that they were improperly detained at the East Los Angeles Sheriff's Station and later punished through involuntary shift transfers for failing to give non-privileged statements in connection with an internal criminal civil rights investigation of their possible misconduct while on uniformed patrol duty. The deputies alleged § 1983[1] violations of their own Fourth Amendment right to be free from unreasonable seizures, their Fifth Amendment due process right against compelled self-incrimination, and their Fourteenth Amendment due

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[1] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

process rights to be free from coercive police questioning and governmental conduct that shocks the conscience. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Shortly after 1:30 a.m. on September 5, 2002, Lieutenant Abel Moreno, the Watch Commander on duty at the East Los Angeles Sheriff's Station, learned that a citizen had been hospitalized with injuries to his head and back due to an alleged assault with a baton or flashlight without provocation by a uniformed deputy. The victim, Martin Flores, had been a bystander at the scene of a narcotics investigation when he was allegedly assaulted. The deputies were present while a search warrant was being executed by narcotics officers.

Sheriff's Department supervisors immediately initiated an internal affairs investigation into victim Flores's complaint of deputy misconduct. Sergeant Burke went to the hospital and obtained a videotaped statement from complainant Flores. Burke observed obvious physical injuries suffered by Flores. Burke then returned to the station, conferred with his superiors, and informed the deputies who had been at the scene of the search that, at the end of their patrol shift at approximately 6:00 a.m., they should return to the station. They were instructed not to leave work before speaking to internal affairs investigators.

Shortly before 6 a.m., Burke and Moreno informed plaintiff Elizabeth Aguilera that she and the other deputies were now the focus of an internal criminal investigation. The Los Angeles County Sheriff's Department has two separate internal investigation units: the Internal Affairs Bureau ("IAB"), which

investigates allegations of an administrative nature and can recommend employee discipline up to and including termination; and the Internal Criminal Investigation Bureau ("ICIB"), which only investigates allegations of a criminal nature for presentation to prosecuting attorneys who can pursue criminal charges against employees.

The deputies, each of whom had served in sworn law enforcement positions for five to twenty years with the Department, were familiar with Sheriff's Department policies and procedures regarding internal criminal investigations. Under the Sheriff's Department's Manual of Policies and Procedures, officers have an affirmative duty to cooperate during such an investigation. A failure to cooperate can subject a deputy to administrative discipline. The Department's policies allowed it to require its employees to remain at work beyond their normal shift. When this occurs, the Department compensates its personnel at overtime rates. The deputies had received training on how to manage and process persons suspected of criminal activity.

While the deputies waited at the station to be interviewed, they were told to remain in the report writing room, the basement roll call briefing room, and then the COPS team office, all of which were unlocked. While they were waiting, several supervisors later named as defendants entered the office intermittently to ask if the deputies needed anything to eat or drink. A drinking fountain was available. No one asked the deputies to relinquish their weapons or badges. The deputies were allowed to talk with each other, sleep, make and receive telephone calls, and travel to the bathroom unescorted.

The deputies were never placed under arrest, searched, physically restrained, or otherwise touched or subjected to the use of force. No deputy asked permission to leave the station. While waiting to be interviewed, the deputies completed overtime slips. They later received overtime pay or were otherwise compensated for all time spent at the station after their regular shift had ended.

At approximately 6:30 a.m., the deputies were called to Captain Thomas Angel's office, the Commanding Officer of the East Los Angeles Station. According to the deputies, Captain Angel announced, in a harsh, accusatory manner, that he knew that one of them had used excessive force on Flores, that the others were covering it up, and that one or more of them could be criminally prosecuted or fired for doing so. Captain Angel informed the deputies that the only way to avoid criminal charges was to "come forward now," which they understood to mean to give an immediate and voluntary statement to the ICIB investigators without any protection against later use of such statements against them.

At around 11:30 a.m. or noon, Sergeant Russell Kagy of the ICIB, the lead criminal investigator assigned to the case, began interviewing each deputy sheriff individually. Kagy asked each deputy if he or she would provide a statement, and each declined based on the advice of counsel. No deputy was asked to waive his or her right against having any statement used against him or her in a later criminal proceeding, and no deputy gave either a compelled or voluntary statement at this time. The deputies were advised by Sergeant Kagy that they were not yet formally considered suspects, but at this time they could not be eliminated as suspects either. After

each deputy declined to give a statement, Kagy terminated the interview, and the deputies were told they were free to leave the station.

None of the deputies under suspicion could initially be cleared of wrongdoing, and they were each then reassigned from their respective street patrol duties to station duties pending completion of the ongoing investigation into possible criminal violations of the civil rights of Flores. Each deputy attests that the reassignment led to personal hardship.[2] Captain Angel asked each deputy to provide a written memorandum setting forth the specific circumstances of his or her hardship and how it related to the reassignments, but he did not receive any memoranda in response to his request. The deputies concede that the Department could change their shifts and assignments at will, and that being transferred to different shifts is a fairly common practice within the Sheriff's Department.

In the following two months, Sergeant Kagy conducted a thorough investigation into the events of September 5, 2002. Coordinating with prosecutors from the Los Angeles County District Attorney's

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[2] Certain deputies allege that their temporary positions afforded decreased opportunity for earning overtime. However, according to the collective bargaining agreement negotiated between the Department and the deputies' bargaining representative (the Association for Los Angeles Deputy Sheriffs), deputies who are being investigated internally are not necessarily entitled to overtime assignments substantially related to the matters under inquiry. We read this agreement to mean that deputies being investigated for unlawfully assaulting a member of the public may not be entitled to overtime work assignments in the field involving unsupervised interactions with the public in case the complaint is later sustained by the results of the internal investigation.

Office and the United States Attorney's Office for the Central District of California, Kagy communicated and met with approximately two dozen individuals; reviewed Department files and audiotapes; and gathered medical records, 911 communication records, and photographs. In August 2003, Sergeant Kagy submitted the case investigation report to the District Attorney's Office for its consideration of filing criminal charges.

In September 2003, the District Attorney's Office requested compelled statements from deputies Aguilera, Ramirez, Carrillo and Arellano. During the process of extracting these compelled statements, none of the deputies were asked to waive his or her constitutional right against having the statement used against him or her in a criminal proceeding. Within days of providing their compelled statements to the investigators, the four deputies were cleared by their supervisors and restored to their pre-investigation duty assignments. Most of the deputies were reassigned in early October 2003. Deputy Bardon was not reassigned until December 2003 when the District Attorney declined to file criminal charges against him. No federal criminal charges were ever brought.

II

We review a grant of summary judgment de novo. *Jones v. Union Pacific R.R. Co.*, 968 F.2d 937, 940 (9th Cir.1992). An order granting summary judgment will only be affirmed if the evidence, read in the light most favorable to the non-moving party, demonstrates the absence of a genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Taylor v. List*, 880 F.2d 1040, 1044 (9th Cir.1989).

Also subject to de novo review is the district court's grant of qualified immunity. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Under *Saucier v. Katz*, 533 U.S. 194, 201 (2001), we take a two-step approach in determining whether the defendant supervisors are entitled to qualified immunity. First, we determine whether the supervisors violated the deputies' constitutional rights. *See id.* If we answer in the affirmative, we proceed to determine whether that right was "clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See id.* at 201-02. If we determine at the first step that no constitutional violation occurred, the qualified immunity inquiry is at an end. *See id.* at 201.

III

The deputies argue that their detention at their duty station pending questioning amounted to an impermissible seizure under the Fourth Amendment. We have not, before today, had occasion to address whether and under what circumstances a law enforcement officer is seized under the Fourth Amendment when he is ordered by his supervisor to remain at a designated location for questioning about the officer's possible official misconduct triggering a criminal investigation. "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (internal quotation marks omitted). A seizure occurs when an individual submits to a show of lawful authority or

an application of physical force by a law enforcement agent. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991). An encounter between an officer and an individual "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

The application of the Fourth Amendment to the employment context presents special issues. While "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Constitution does not afford public employees greater workplace rights than those enjoyed by their private sector counterparts. When determining whether a superior law enforcement officer "seized" a subordinate, we must glean from the circumstances whether the subordinate's decision to heed his superior's order to remain at a designated location stemmed from a fear, if he tried to leave, of physical detention, or merely adverse employment consequences.

We are mindful that, "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 U.S. 210, 218 (1984). This is particularly so in the paramilitary environment of a police agency that is both a law enforcer and a public employer. Police and sheriff's departments must frequently abide by collective bargaining agreements that govern in great detail the terms and conditions of the workplace. But society has an equally important interest in ensuring the highest integrity by those entrusted with discharging the duties of a peace officer.

As a preliminary matter, we hold that a law enforcement agency has the authority as an employer to direct its officers to remain on duty and to answer questions from supervisory officers as part of a criminal investigation into the subordinates' alleged misconduct. *See Driebel v. City of Milwaukee*, 298 F.3d 622, 638 (7th Cir. 2002); *United States v. Muegge*, 225 F.3d 1267, 1270 (11th Cir. 2000) (per curiam) (finding no seizure when an on-duty civilian Air Force employee was ordered to report for an interview with an intelligence officer); *United States v. Baird*, 851 F.2d 376, 380-82 (D.C. Cir. 1988) (finding no seizure when an on-duty Coast Guard officer was ordered to report for an interview with an intelligence officer).[3] A law enforcement officer is not

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[3] The dissent chastises us for our "selective reading" of *Baird*, *Muegge*, and *Driebel*, because in those cases the officers were either specifically told that their interviews were voluntary, *Baird*, 851 F.2d at 378, 380, 383; *Muegge*, 225 F.3d at 1270, or that they were not suspected of a particular crime, *Driebel*, 298 F.3d at 648. Although these statements certainly were factors that militated in favor of a finding that the officers were not in custody, they do not, as the dissent suggests, create a bright-line rule that the employer must unequivocally announce which "hat" (employer or law enforcement agent) it is wearing. Indeed, the case-by-case, fact specific inquiry has remained the same for several years and "is simply whether there is a formal arrest or restraint on movement of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal quotation marks omitted). This is particularly so where the employer is a law enforcement agency and the employee is a sworn peace officer specially trained in constitutional rights attending the law of arrest. We can presume a greater degree of sophistication on that subject by these deputies than we would presume of the lay civil rights plaintiff encountering a police investigation for the first time. Further, the existence of a collective bargaining agreement that imposes a specific duty on police employees to cooperate in internal affairs

seized for purposes of the Fourth Amendment simply because a supervisor orders him to remain at work after the termination of his shift or to come into the station to submit to questioning about the discharge of his duties as a peace officer. *See Driebel*, 298 F.3d at 638. In the case at bar, if the deputies had refused to wait at the station to be questioned regarding the events of September 5, 2002, or otherwise failed to cooperate in the criminal investigation, they could have been subject to administrative discipline including termination. However, while a law enforcement agency can order its employees to cooperate in a criminal investigation as a condition of their continued employment subject to the Constitution, it may not seize its employees and detain them against their will without probable cause.[4] *See id.* at 639; *Cerrone v. Brown*, 246 F.3d 194, 201 (2d Cir. 2001). Nor may compelled statements be obtained in violation of their constitutional rights against self-incrimination without the protection afforded by Supreme Court decisions we discuss below.

The first issue, then, is whether the deputies were seized without the existence of probable cause. Since the Fourth Amendment does not protect against the threat of demotions or job loss, the relevant constitutional inquiry is whether a reasonable deputy in the position of the plaintiffs would have feared detention if he had refused to obey the commands of his supe-

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investigations makes the context quite different from the run-of-the-mine civil rights case.

[4] A superior law enforcement officer may briefly stop and question a subordinate officer consistent with the holding in *Terry v. Ohio*, 392 U.S. 1 (1968), as any police officer may do when he has a reasonable suspicion that criminal activity may be afoot.

rior officers. *See United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981). Within this context, we must distinguish between a department's actions in its capacity as an employer and its actions as the law enforcement arm of the state. *See Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity*, 385 U.S. at 493.

In identifying which circumstances are most salient to our analysis of whether a seizure took place, we find instructive the Seventh Circuit's analysis in *Driebel*, 298 F.3d at 622. There, our sister appellate court considered the Fourth Amendment claims of four police officers who had been ordered to remain on duty or to accompany detectives to headquarters and answer questions during the course of an internal criminal investigation of possible misconduct involving the acquisition by police officers of unregistered firearms from nefarious sources. The court determined that two officers had been seized when detectives surveilled a pickup point and uniformed officers arrived to retrieve the weapons hidden in a dumpster. The court determined that two others had not been seized but merely submitted to conditions of their employment when ordered to return to the station for further questioning. *See id.* at 641.

The Seventh Circuit emphasized the following factors as critical to its calculus of whether a seizure had taken place: the experience level of the subordinate officer, *see id.* at 647; whether the treatment was consistent with that allowed by department guidelines or general policy, *see id.* at 649 n. 16; the occurrence of physical contact or threats of physical restraint, *see id.* at 646, 647, 649 & n. 16; explicit refusal of permission to depart, *see id.* at 649 n. 16; isolation of the subordinate officer, *see id.* at 643, 649

n. 16; permission to use the restroom without accompaniment, *see id.* at 648, 649 n. 16; the subordinate officer's being informed that he was the subject of a criminal investigation, *see id.* at 643; whether the subordinate officer was spoken to "in a menacing or threatening manner," *see id.* at 648, 649 n. 16; whether the subordinate officer was under constant surveillance, *see id.* at 646; whether superior officers denied a request to contact an attorney or union representative, *see id.* at 648; the subordinate officer's ability to retain law enforcement equipment, including weapons and badges, *see id.* at 643, 648, 649 n. 16; the duration of detention, *see id.* at 646; and the subordinate officer's receipt of overtime pay, *see id.* at 643.

We adopt the reasoning articulated in *Driebel.* Applying these factors to the detention of the deputies in the case at bar, we hold that they were not seized within the meaning of the Fourth Amendment. Each deputy had at least five years of experience and testified to his or her familiarity with the Department's policies and state criminal law. The deputies were well versed through their police academy and on-the-job training in Department procedures regarding the manner in which individuals are placed under arrest and the Department's statutory and contractual authority to order officers to remain at work on overtime. In addition, each deputy accepted as a condition of his or her employment the official policy that he or she must cooperate with other members of the Department conducting an internal criminal investigation.

While the deputies waited to be interviewed, the Department did not employ standard procedures for detaining criminal suspects at the station, such as

searching them, booking them, and inventorying their possessions. The deputies must have been aware that, without probable cause, no superior officer was permitted to use force or any show of authority to prevent them from departing the station if they so chose. While the deputies obviously understood that any violation of the order not to leave work might breach administrative rules and could result in their discipline as employees, we do not think that prospect is sufficient to classify this situation as a criminal seizure.

The Department did not create a coercive environment in which to detain the deputies. The deputies were not transported to the station against their will. They were not held in a cell, but rather in unlocked rooms with intermittent supervision. The Department did not refuse any deputy's request to depart (though no one asked to leave). Supervisors repeatedly asked the deputies if they wanted food or drink and allowed them to travel to the restroom and water fountain unaccompanied. The deputies were not prevented from phoning their attorney or union representative for legal or contractual advice and remained in possession of their Department-issued equipment, including weapons and badges. The deputies were never touched or threatened with physical restraint. They were not isolated from one another or prohibited from speaking with one another. After the deputies were questioned and declined to provide an unprotected statement, they were immediately allowed to leave the station. All were paid overtime. In short, the deputies were not treated like criminal suspects, and they should have known – given their training, years on the force, and familiarity with Department procedures and protocol

– that, if they chose to leave the station in defiance of their supervisors' orders, they might have been subject to administrative discipline but could not have been forcibly detained absent full physical arrest.

Admittedly, some factors militate toward finding that a seizure took place. In particular, the deputies were informed that they were under criminal investigation. In addition, Captain Angel, the highest ranking officer at the station, conveyed in a "harsh, accusatory tone" his belief that one of the deputies had assaulted Flores, he insinuated that the others were covering it up, and he further warned that one or more of them would go to prison and lose their jobs if they were involved in such behavior. While the message may have been delivered in a harsh tone of voice to convince his subordinates that the Captain meant what he said in the hopes of piercing the "blue shield" of silence he thought he was facing, we are not prepared to believe that trained deputy sheriffs would nonetheless have been confused as to their legal and contractual rights under the circumstances. We believe that a reasonable deputy in the plaintiffs' position would have understood that he was ordered to report and remain at the station until interviewed by ICIB investigators, and that he would likely suffer criminal civil rights prosecution and administrative discipline if the evidence revealed his involvement in the assault of Flores. However, these facts are not sufficient, in and of themselves, to transform the deputies' voluntary accession to their supervisors' order to remain at work into a seizure cognizable as an arrest under the Fourth Amendment.

We decline to hold that the deputies were seized by their supervisors' orders, which were issued in accordance with Department policies, to cooperate with a

necessary internal criminal investigation. To hold otherwise would equate to a pronouncement that a law enforcement agency cannot, even under negotiated provisions of a labor agreement or the agency's general policies to preserve public confidence and the integrity of its personnel in the discharge of their public safety responsibilities, order its employees to cooperate in an investigation of possible officer misconduct by standing by at their duty station after the end of their watch. We do not intend to, and will not, act as a super-personnel board to micromanage the employment actions of law enforcement professionals. "Law enforcement agencies are entitled to deference, within reason, in the execution of policies and administrative practices that are designed to preserve and maintain security, confidentiality, internal order, and esprit de corps among their employees." *Driebel*, 298 F.3d at 648. We affirm the district court's grant of summary judgment on the deputies' Fourth Amendment claim.

IV

The deputies contend they were deprived of their Fifth Amendment right (made applicable to the states by the Fourteenth Amendment) against self-incrimination. The deputies argue that supervisors violated this right by forcing them to choose between giving a voluntary, non-immunized statement that could be used against them in subsequent criminal or administrative proceedings and retaining their current job assignments and work shifts. The deputies' argument is unavailing.

In a series of cases involving the Fifth Amendment rights of public employees, the Supreme Court has made clear that public employees cannot be compelled to choose between providing unprotected

incriminating testimony or losing their jobs. *See Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (holding that the discharge of city employees for refusing to sign waivers of immunity or for invoking their privilege against self-incrimination violated the Fifth Amendment); *Gardner*, 392 U.S. at 273 (same); *Garrity*, 385 U.S. at 493 (holding that the state cannot use the incriminatory statement of an employee secured under threat of job loss in a subsequent criminal proceeding); *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (holding that the "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized").

The Court was careful, however, to preserve the right of a public employer to appropriately question an employee about matters relating to the employee's possible misconduct while on duty. In *Gardner*, the Court noted that the constitutional violation arose not when a public employee was compelled to answer job-related questions, but when that employee was required to waive his privilege against self-incrimination while answering his employer's legitimate job-related questions. *See* 392 U.S. at 278. If the officer "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal." *Id.* (footnote and citation omitted); *see also Uniformed Sanitation Men*, 392 U.S. at 284; *Lefkowitz*, 431 U.S. at 806 ("Public employees may constitutionally be

discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity."); *Chavez v. Martinez*, 538 U.S. 760, 768-69 & n. 2 (2003) (outlining the scope of public employees' rights under the Fifth Amendment self-incrimination clause). "This language strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege." *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995).

We hold that the supervisors did not violate the deputies' Fifth Amendment rights when they were questioned about possible misconduct, given that the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination. Indeed, it appears that the deputies were never even *asked* to waive their immunity.[5] In

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[5] Our colleague in dissent maintains that there is a factual dispute as to whether the officers were compelled to make incriminating statements. If compelled, on the one hand, the officers automatically would be entitled to immunity for any incriminating statements they made. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). If not under compulsion, on the other hand, then they had the constitutional right to remain silent without fear of punishment. *Lefkowitz*, 414 U.S. at 84-85. The factual dispute arises, the dissent insists, because Captain Angel, "by including the risk of prison as one of the consequences of not speaking . . . was clearly doing something other than giving a command to a subordinate." Dissent at [29a].

However, as the Supreme Court emphasized in *Gardner*, the Constitution is offended not when an officer is compelled to answer job-related questions, but only when the officer is required to waive his privilege against self incrimination while answering legitimate job-related questions. 392 U.S. at 278.

these circumstances, it is clear that the deputies' Fifth Amendment right against self-incrimination was not implicated by the supervisors' conduct. *See Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (holding that "[t]he Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers"); *Wiley*, 48 F.3d 773 (holding that officers' Fifth Amendment rights were not violated given that the officers had not been asked to waive their privilege against self-incrimination and the questions posed to them were narrowly job-related).[6] It is of no moment that refusing to answer

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Although there may have been some initial coercion to *cooperate and answer* questions, the record does not support a triable issue of fact as to whether the tandem requirement of *compelling* the officers to waive their Fifth Amendment rights was met. *Wiley*, 48 F.3d at 777 (reasoning that "forcing a public employee to answer potentially incriminating job-related questions *does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege*") (emphasis added). Indeed, the deputies were not asked to waive their immunity. Nor were any statements ever used against them.

[6] The dissent believes that the only constitutionally permissible rule is one that would require public employers to expressly inform employees that "any statements they give can't be used against them in criminal proceedings" before taking disciplinary action against the employee for refusing to speak. Dissent at [30a]. This rule, it retorts, would be "easy as pie" to administer and no legitimate argument exists against such an approach. Dissent at [33a]. Indeed, the dissent complains, by adopting "the harsh and unfair rule of the Fifth and Eighth Circuits, [w]e permit[] the government to punish police officers who refuse to make self-incriminating statements, even though they may not be sure whether or not they have immunity." Dissent at [30a].

the investigator's questions could have resulted (and, in fact, did result) in reassignment: We do not consider re-assignment from field to desk duty as equivalent to losing one's job under *Gardner*, 392 U.S. at 273.[7]

Despite the facial appeal of the rule that the dissent would like us to apply with twenty-twenty hindsight, the contours of permissible public employer conduct have been articulated by the Supreme Court. It is well established that a police supervisor may not compel a subordinate to waive his privilege against self-incrimination. *Gardner*, 392 U.S. at 278. But this mandate does not, as the dissent suggests, require the adoption of the dissent's bright-line rule, adopted by the Second, Seventh, and Federal Circuits. *See Weston v. United States Dep't. of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 & n. 4 (7th Cir. 1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 426 F.2d 619, 621, 627 (2d Cir. 1970).

No matter how appealing such a variation on Supreme Court precedent may be, the rule is not required by *Gardner*. Significantly, the dissent continually glosses over critical facts. Although it notes that *Miranda* warnings have "become part of our national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000), this case involves deputies who are charged with administering *Miranda* warnings to suspects in the course of their official duties. These deputies had at least five years experience each, testified to familiarity with Department policy and criminal law, and were versed in the Department's procedures for placing suspects under arrest. Finally, to impose this bright-line rule, and therefore liability on the supervisors, would be unnecessarily harsh and in contravention of basic qualified immunity principles. *Gardner* does not require, nor is it clearly established law in our circuit, that a public employer must expressly inform an employee that his statements regarding actions within the course and scope of his employment cannot be used against him in a criminal proceeding before taking administrative action against that employee. *See Saucier*, 533 U.S. at 202.

[7] The dissent bemoans this *dicta* statement because the Supreme Court has rejected the notion that actions short of

The deputies' Fifth Amendment claim also fails because the deputies were never charged with a crime, and no incriminating use of their statements has ever been made. In *Chavez*, 538 U.S. at 769 (plurality opinion),[8] the Supreme Court held that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." Only after a compelled incriminating statement is used in a criminal proceeding has an accused suffered the requisite constitutional injury for purposes of a § 1983 action. *See id.*; *United States v. Antelope*, 395 F.3d 1128, 1140-41 (9th Cir. 2005) (discussing *Chavez* and limiting the reach of its holding to the context of § 1983 actions); *see also Lingler v. Fechko*, 312 F.3d 237, 240 (6th Cir. 2002) (holding that a police officer's Fifth Amendment right was not violated because he had not been compelled to waive his privilege against self-incrimination and his statements were never used against him in subsequent

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firing a public employee cannot form the basis of a viable Fifth Amendment claim. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n. 8 (1990) (reasoning that "even an act as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her [constitutional] rights," offends the Constitution) (internal quotation marks omitted). This point is largely moot because we agree with the district court's observation that the supervisors' actions in this case "w[ere] [not] done to punish [the deputies] for asserting their constitutional rights." Dissent at [34a].

[8] Agreeing on this holding were Chief Justice Rehnquist and Justices Thomas, O'Connor, Scalia, Souter, and Breyer. *See id.* at 763, 773 (Op. of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, J.J.); *id.* at 777-79 (Op. of Souter, J., joined by Breyer, J.). *See McKinley v. City of Mansfield*, 404 F.3d 418, 431 n. 12 (6th Cir. 2005).

criminal proceedings).[9] We affirm the district court's grant of summary judgment on this claim.

V

The deputies argue that the district court erred in concluding that the supervisors' conduct did not violate the deputies' Fourteenth Amendment substantive due process rights. In our view, the Sheriff's Department had a legitimate need to determine whether an officer or officers had engaged in criminal behavior under color of office and, until that criminal investigation was resolved, it had a duty to protect the public from the potential for further assaults by the unknown deputy potentially responsible by reassigning all of those involved in the incident to station duty. Even assuming that the deputies were assigned to less favorable shifts and given "degrading" employment positions, we agree with the district court that the reassignment did not transform the questioning into a coercive police investigation under *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992). We also agree that a reassignment, even as punishment for failure to make a voluntary statement, does not "shock[] the conscience" or run counter to the "decencies of civilized conduct" under *Rochin v. California*, 342 U.S. 165 (1952). We affirm the grant of summary judgment on these claims.

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[9] The dissent makes too much of our citation to *Chavez v. Martinez*, 538 U.S. at 760. Plainly, *Chavez* applies in situations where a party actually makes an incriminating statement and the government then decides to use it in a criminal proceeding. If it does so, the Fifth Amendment is violated. Otherwise, it is not. Here, we rely on the rule in *Chavez* primarily for the proposition that since no statement was ever used against the deputies, there is no cognizable Fifth Amendment claim.

VI

The district court disregarded police reports of Sergeant Kagy's internal investigation, which documented the allegations against the deputies, on the basis that they constituted inadmissible hearsay and were not sufficiently reliable to qualify for the business records exception. *See* Fed.R.Evid. 803(6). The deputies contend on appeal that they offered the reports for the non-hearsay purpose of proving the supervisors' knowledge of exculpatory facts clearing the deputies of the alleged misconduct on a date much earlier than that on which their former field duties were restored. However, even if the district court erred in failing to consider the reports, we find any error harmless since, even considering the information in the reports, the deputies' Fifth Amendment and Fourteenth Amendment claims fail as a matter of law.

VII

Because we find that the supervisors did not violate the deputies' Fourth, Fifth, or Fourteenth Amendment rights, we affirm the district court's grant of summary judgment in favor of all defendants. Since no violation of any constitutional right occurred, we need not reach the claim against the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). It too was properly dismissed.

AFFIRMED.

KOZINSKI, Chief Judge, dissenting for the most part:

When a law enforcement agency suspects one of its employees of criminal wrongdoing, their relationship becomes a strained and complex one. The employer, of course, retains all powers over the employee qua employer – it may ask him to work overtime, complete reports, answer the questions of supervisors and generally comply with the terms of the employment relationship. In addition, however, the employer is also in the business of detecting and prosecuting criminal activity, so the employer can – and generally has the duty to – gather evidence that may be used to prosecute the employee and others.

Whether the employer is wearing one hat or the other (or both) is often unclear, which can put the employee in a precarious situation by forcing him to choose between disobeying an order from his employer and giving up the constitutional privilege against self-incrimination. In such situations, the employer must not play on this ambiguity to the disadvantage of the employee; rather, it must clarify whether it is questioning the employee in its capacity as an employer or as a law enforcer. Where the employer fails to do this, the employee is entitled to act on the assumption that he is dealing with a law enforcement agency, if a reasonable person in his position would have so believed. Plaintiffs here easily meet this standard, and so they are entitled to bring their case before a jury; this is precisely the kind of conflict that a group of citizens drawn from the community is in the best position to resolve.

1. Arrest Without Probable Cause

Plaintiffs here presented a triable issue of fact on their claim that they were arrested without probable

cause because a jury could find, on the evidence presented, that reasonable people in plaintiffs' position would have believed they were placed under arrest and not merely asked to work overtime. As the majority admits with commendable candor, there is evidence that "militate[s] toward finding that a seizure took place." Maj. op. at [15a]. After all, plaintiffs were told they were under criminal investigation, and they were interviewed by the Internal Criminal Investigation Bureau (ICIB), which investigates only criminal allegations against employees. *Id.* at [5a]. Moreover, plaintiffs' superior, Captain Angel, speaking in a "harsh, accusatory manner," told them that he knew one of them had used excessive force on Flores, that the others were covering up and that one or more of them would go to prison and lose their jobs unless they gave statements. *Id.*

The majority relies on three cases in support of its finding that plaintiffs were not detained, but cites them only selectively. *Id.* at [10a-11a]. *United States v. Baird*, 851 F.2d 376 (D.C. Cir. 1988), found no seizure because the Coast Guard officer there was told that the interview was "voluntary" and that he "was free to go whenever he wanted to." *Id.* at 378; *see id.* at 380, 383. *United States v. Muegge*, 225 F.3d 1267 (11th Cir. 2000) (per curiam), found no seizure because the public employee "was told he was free to leave at any time and did not have to answer any questions." *Id.* at 1270. *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002), turned on the fact that the police officer there "was never informed that he was the suspect for any particular crime, nor was he spoken to in a menacing or threatening manner." *Id.* at 648.

Our case is materially different from *Baird*, *Muegge* and *Driebel*. Plaintiffs weren't told they were free to leave, and they weren't told they didn't have to answer questions. *Cf. Muegge*, 225 F.3d at 1270; *Baird*, 851 F.2d at 378. Instead, plaintiffs were told they were suspects in a criminal investigation, and their superior spoke to them in a harsh, accusatory tone and threatened criminal sanctions. *Cf. Driebel*, 298 F.3d at 648. A seizure may be effected solely by "the use of language or tone of voice indicating that compliance with the officer's request would be compelled." *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987). Given the context, plaintiffs could reasonably have believed that they had to stay at the police station on pains of arrest. At least, a reasonable jury could so find.

I don't share the majority's worry that letting this case go to trial would undermine the employer's authority to insist that employees remain on duty past their shifts to answer questions. *See* maj. op. at [15a-16a]. An employer can exercise that right without difficulty if he makes it clear that the employees are not under arrest and he avoids the kind of accusations Captain Angel hurled at plaintiffs here. But where the employer brings in criminal investigators, yells at the employees, accuses them of crimes, threatens them with criminal punishment and does *not* make it clear that they're *not* under arrest, a reasonable jury could find that the employees were seized.

If plaintiffs were arrested, the seizure was unconstitutional because the police had no probable cause. *Dunaway v. New York*, 442 U.S. 200, 216 (1979). Flores never identified the officer who hit him. Instead, he claimed to have been hit by a male deputy who

was possibly Hispanic, but all of the officers in the area were Hispanic and all but one were male. That one member of a group may have committed a crime doesn't establish probable cause to arrest everyone in that group. *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991).

Nor were defendants entitled to qualified immunity because the law on unconstitutional seizures was "clearly established" at the time of the incident. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). No reasonable officer would have believed that he could arrest plaintiffs based on the evidence available. If a jury determines that plaintiffs were in fact arrested when they were detained at the police station, they would be entitled to damages – if only nominal ones for the harm they suffered as a result of the unlawful arrest. I would therefore reverse the district court's grant of summary judgment for defendants on plaintiffs' Fourth Amendment claims and remand for trial on the issue.

2. Retaliation

Plaintiffs claim that defendants retaliated against them for failing to provide statements about the Flores incident for about a year – until defendants explicitly ordered them to provide such statements. According to plaintiffs, only at that point could they be sure that their statements could not be used against them in criminal proceedings and so they reasonably remained silent to preserve their constitutional privilege against self-incrimination. If defendants had really wanted those statements, they could easily have ordered plaintiffs to provide them at any time following the incident, and thereby have removed all doubt as to whether the statements could be used to prosecute plaintiffs. Instead, defen-

dants played cat and mouse with plaintiffs for 12 months, forcing plaintiffs to guess whether any statements they gave could be used to prosecute them. In other words, defendants put economic pressure on plaintiffs to give up their Fifth Amendment rights – or so a jury could reasonably find on this record. I would therefore remand on this issue as well, and allow it to go to trial.

My disagreement with the majority proceeds along four lines:

a. First, I believe there is genuine doubt as to whether plaintiffs were under compulsion to give a statement, and thus whether any statements they gave could have been used to prosecute them. Certainly, there was no express order. The closest we have is Captain Angel's statement on the morning following the incident, where he spoke to plaintiffs in a harsh, accusatory manner and told them that they could go to prison or lose their jobs if they did not give statements. But it's not clear that this was an order; it might have been a prediction or a threat. Or, Captain Angel might have been using a variant of the Prisoner's Dilemma by suggesting that each of the officers try to save his own skin by pointing the finger at one or more of the others.

Significantly, Captain Angel mentioned that plaintiffs could go to prison if they did not make statements; disobeying an employer's order can result only in job discipline, never criminal punishment. By including the risk of prison as one of the consequences of not speaking, Captain Angel was clearly doing something other than giving a command to a subordinate. Had some of the plaintiffs given statements, and had they been used against them in criminal proceedings, the prosecution would

doubtless have claimed that plaintiffs waived their privilege against self-incrimination because Captain Angel's statement was not a command. I can't say for sure that such an argument would have failed.

Whether a person faces compulsion is a question of fact, *see United States v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1976), and plaintiffs have raised a genuine dispute as to whether they were under compulsion to give statements. A jury might well look at the situation – including the fact that defendants could have removed all doubt on the subject by giving plaintiffs a direct order – and conclude that plaintiffs were not under compulsion.

This factual dispute is material because, whether plaintiffs faced government compulsion determines whether they had immunity, which in turn determines whether they could be punished for refusing to make self-incriminating statements. Public employees *automatically* have immunity when they are compelled to make self-incriminating statements during criminal investigations related to their official duties. *See Minnesota v. Murphy*, 465 U.S. 420, 434 (1984); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). When a public employee is ordered to speak, his statements can't be used against him in a criminal proceeding, and he can therefore be subjected to adverse employment consequences for refusing to speak. *See Gardner*, 392 U.S. at 276, 278. But if plaintiffs weren't *compelled* to make self-incriminating statements, they didn't automatically have immunity. And, if they had no immunity, they were constitutionally entitled to remain silent. Reasonable jurors could find that

plaintiffs didn't have immunity, thus making it unconstitutional for defendants to punish them for refusing to make self-incriminating statements. *See Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973); *Uniformed Sanitation Men*, 392 U.S. at 283; *Gardner*, 392 U.S. at 276, 278.

b. Second, I would hold that if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak. This strikes me as the only constitutionally permissible rule. It is also the only just rule, and police officers are entitled to be treated justly and with dignity, no less than anyone else. The majority, instead, adopts the harsh and unfair rule of the Fifth and Eighth Circuits by permitting the government to punish police officers who refuse to make self-incriminating statements, even though they may not be sure whether or not they have immunity. *See Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982).

The Second, Seventh and Federal Circuits have the better approach: The government must tell public employees that they have immunity before it can constitutionally punish them for refusing to make self-incriminating statements. *See Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 & n. 4 (7th Cir. 1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 426 F.2d 619, 621, 627 (2d Cir. 1970) (Friendly, J.).[10] It's

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[10] State courts – including California where these events took place – have also adopted this position. *See, e.g., Eshelman v.*

common knowledge that the Fifth Amendment protects the privilege against self-incrimination, as this is explained in the *Miranda* warning which has "become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). A public employee under criminal investigation should be able to rely on the privilege against self-incrimination, as plaintiffs did here, until he is told in clear terms that the statements can't be used to prosecute him.

We treat immunity as a substitute for the Fifth Amendment privilege against self-incrimination because immunity "leaves the witness and the [government] in substantially the same position as if the witness had claimed his privilege." *Kastigar v. United States*, 406 U.S. 441, 458-59 (1972) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)). Usually, the government needs to affirmatively grant immunity, *see id.* at 459, which concurrently informs the witness that he has immunity. The same is not true where the immunity kicks in automatically, such as when a government employee is ordered to give a statement during the course of a criminal investigation. The employee may, first of all, have doubts as to whether or not he has been *ordered* to give the statement. This case amply demonstrates this ambiguity and there are numerous other fact patterns where it would not be clear whether the employee has been ordered to speak. I see no justification for forcing the employee to guess

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Blubaum, 114 Ariz. 376, 378-79, 560 P.2d 1283 (Ct.App.1977); *Lybarger v. City of L.A.*, 40 Cal.3d 822, 829, 221 Cal.Rptr. 529, 710 P.2d 329 (1985); *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 284, 607 P.2d 581 (1980); *City of Warrensville Heights v. Jennings*, 58 Ohio St.3d 206, 209-10, 569 N.E.2d 489 (1991).

whether or not he's been given an order and, hence, whether he has immunity. *See* pp. [25a-28a] *supra.*

But even when it is clear that the employee has been given an order, the employee may not know that this gives him automatic immunity. Automatic immunity only leaves a public employee "in substantially the same position as if the [employee] had claimed his privilege," *Kastigar*, 406 U.S. at 458-59, when the employee *knows* without a doubt that he has immunity. *See Hill*, 160 F.3d at 472-73 (Heaney, J., dissenting); *Kalkines v. United States*, 473 F.2d 1391, 1395 (Ct. Cl. 1973). After all, "[t]he logic underlying *Gardner* is that an officer under investigation is not required to speculate as to what his constitutional rights are." *Lybarger v. City of L.A.*, 40 Cal.3d 822, 834, 221 Cal.Rptr. 529 (1985) (Bird, C.J., concurring). A person who doesn't know he has immunity, like the plaintiffs here, *see* maj. op. at [5a], would justifiably believe that "any statement he [makes] may be used . . . against him." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

We can't expect public employees who are pressured to give a statement to know that they have immunity. I, for example, had no idea, even though I have been a government employee involved in law-related activities for almost three decades. The employer is in complete control of these situations, and it would be easy as pie for supervisors to inform employees that they have been ordered to speak and therefore have immunity. I can see no legitimate argument against this simple and easily administered rule, which would avoid the kind of mess we have here.

c. Third, the majority's reliance on *Chavez v. Martinez*, 538 U.S. 760 (2003), *see* maj. op. at [21a], is

misplaced because *Chavez* only applies where a party actually makes self-incriminating statements. In *Chavez*, the Supreme Court held that there is no Fifth Amendment violation when someone makes a self-incriminating statement but that statement is never used against him. *Chavez*, 538 U.S. at 769 (plurality opinion); *id.* at 777-79 (Souter, J., concurring in the judgment). The majority tries to import the *Chavez* rule – a Fifth Amendment violation can only occur when a self-incriminating statement is used against someone-into cases, like this one, where there are no self-incriminating statements. But *Chavez* itself rejected this. The Court there explicitly stated that the government couldn't "penalize public employees . . . to induce them to waive their *immunity*." *Id.* at 768 n. 2 (plurality opinion). So, under *Chavez*, the Fifth Amendment would be violated if a public employee were fired for refusing to make self-incriminating statements, even though no self-incriminating statement could ever have been used against the employee.

d. Fourth, contrary to Supreme Court precedent, the majority would only find unconstitutional retaliation for actions taken against public employees that are the "equivalent to losing one's job." Maj. op. at [20a]. The Court has rejected the argument that "only those employment decisions that are the substantial equivalent of a dismissal violate a public employee's [constitutional rights]." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (internal quotation marks omitted). Here, plaintiffs allege that they were re-assigned to less prestigious desk jobs and that they were denied promotions because they refused to make self-incriminating statements. If this was done to punish them for asserting their

constitutional rights, it would be unconstitutional, as "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her [constitutional] rights," violates the Constitution. *Id.* at 76 n. 8 (internal quotation marks omitted).

Defendants are not entitled to qualified immunity on plaintiffs' Fifth Amendment claims, because it was "clearly established," *Saucier*, 533 U.S. at 202, that plaintiffs couldn't be retaliated against for refusing to make self-incriminating statements if they didn't have immunity. *See Murphy*, 465 U.S. at 429, 436 n. 7; *Gardner*, 392 U.S. at 276, 278. Plaintiffs could thus also proceed with their conspiracy claims against the individual defendants. Additionally, municipalities aren't protected by qualified immunity, *see Owen v. City of Independence*, 445 U.S. 622, 650 (1980), so plaintiffs should likewise be entitled to proceed with their *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), claims against the County and Sheriff's Department. I would therefore reverse the district court's grant of summary judgment for defendants on plaintiffs' retaliation claims and remand for trial on these issues as well.[11]

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[11] Because I would hold that plaintiffs could establish a Fifth Amendment violation, the district court's exclusion of Sergeant Kagy's ICIB report wasn't harmless error. Rather, the district court abused its discretion in excluding the report because plaintiffs offered it for the non-hearsay purpose of proving the police department knew that plaintiffs hadn't harmed Flores months before plaintiffs were returned to their pre-investigatory duty assignments. *See Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 217 n. 36 (9th Cir. 1958).

I dissent from Parts III, IV, VI and VII. I join Part V because defendants didn't violate plaintiffs' substantive due process rights.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 03-6328 SVW(CWX)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs,
v.
LEROY BACA, ET AL.,
Defendants.

Sept. 15, 2005

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILSON, District Judge.

I. INTRODUCTION

This case arose out of a complaint by a civilian that a deputy sheriff had assaulted him. An internal police investigation ensued in which Plaintiffs, deputies in the Los Angeles County Sheriff's Department, were asked or ordered to remain at work for questioning after their shifts had ended. After brief questioning by a member of the Internal Criminal Investigations Bureau, each deputy invoked his or her Fifth Amendment rights. Plaintiffs were subsequently taken off field duty and then reassigned to other shifts. No charges were ever filed against any of the Plaintiffs, and none of the Plaintiffs was ever forced to testify in any kind of proceeding.

As a result of this incident, Plaintiffs Elizabeth Aguilera ("Aguilera"), Phillip Arellano ("Arellano"),

Benjamin Bardon ("Bardon"), Gustavo ("Gus") Carrillo ("Gus Carrillo"), and Hector Ramirez ("Ramirez") (collectively "Plaintiffs") filed the action for damages and injunctive relief under 42 U.S.C. §§ 1983 and 1988 on September 5, 2003 against Defendants Leroy Baca ("Baca"), William Stonich ("Stonich"), Larry Waldie ("Waldie"), Dennis Dahlman ("Dahlman"), William Sams ("Sams"), William McSweeney ("McSweeney"), Neil Tyler ("Tyler"), Thomas Angel ("Angel"), Arthur Ng ("Ng"), Alan Smith ("Smith"), Margaret Wagner ("Wagner"), Russell Kagy ("Kagy"), Brian Proctor ("Proctor"), the Los Angeles County Sheriff's Department ("LASD" or the "Department"), and the County of Los Angeles (the "County") (collectively "Defendants").

Plaintiffs allege violations of their Fourth Amendment right to be free from unreasonable seizures, their Fifth Amendment right against self-incrimination, their Fourteenth Amendment due process right to be free from coercive police questioning, and their Fourteenth Amendment due process right to be free from governmental conduct which shocks the conscience. Plaintiffs also allege conspiracy and municipal liability.

On June 6, 2005, Defendants filed Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Partial Summary Judgment. On June 22, 2005, Plaintiffs filed their Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment.[1]

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[1] The Court subsequently granted leave to the parties to supplement the record and file additional briefing.

For the reasons set forth below, the Court GRANTS Defendants' Motion for Summary Judgment.

II. FACTS[2]

On September 5, 2002, Plaintiffs were assigned to the East Los Angeles Sheriff's Station (the "Station") as patrol deputies. They were assigned to the early morning shift, with regularly scheduled hours from approximately 10:00 p.m. on September 4, 2002 to 6:00 a.m. or 7:00 a.m. on September 5, 2002.

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[2] As this is a motion for summary judgment, the Court must view the evidence in the light most favorable to Plaintiffs and draw all reasonable inferences in their favor. *See, e.g., Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023 (9th Cir. 2004). In this case, Plaintiffs have made the Court's task unnecessarily difficult by submitting two different statements of facts with no attempt having been made to integrate them. As a result, it is not clear whether the second statement of facts merely supplements the first or supplants it. Furthermore, Plaintiffs' supplemental statement of facts relies extensively on police reports prepared by Sgt. Kagy in November and December 2002. There are several evidentiary problems with these reports. First, while it is true that police reports may in certain circumstances be admissible as a business record, *see Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir. 2000), the proponent of the report has the burden of laying a foundation for their admission. In particular, the Ninth Circuit requires that a proponent establish, through "the testimony of the custodian of the records or other qualified witness," *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985), that the business records were:

> (1) made or based on information transmitted by a person with knowledge at or near the time of the transaction; (2) made in the ordinary course of business; and (3) trustworthy, with neither the source of the information nor method or circumstances of preparation indicating a lack of trustworthiness.

The uniform of a patrol deputy consists of green pants and a tan shirt with no stripes on the sleeve. By contrast, a sergeant's uniform includes three stripes on the sleeve.

At around 1:30 a.m. on September 5, 2002, Plaintiffs and Deputy Joseph ("Joe") Carrillo ("Joe Carrillo") conducted a narcotics investigation at a residence near the intersection of Union Pacific Avenue and Indiana Street in East Los Angeles.[3] Sgt. Sean Burke ("Burke") supervised.

At around this same time, Martin Jamie Flores, a civilian (the "civilian"), called the Los Angeles Police Department ("LASD") from a pay phone near Union Pacific and Indiana to report that a single male deputy, possibly Hispanic, had struck him with a flashlight in the back and head. Paramedics were

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United States v. Catabran, 836 F.2d 453, 457 (9th Cir. 1988) (citing *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985)). In this case, Plaintiffs have proffered no testimony by any witness as to these foundational requirements. Moreover, the police reports were prepared by Sgt. Kagy two to three months after the interviews in question. Given the number of witnesses interviewed by Sgt. Kagy and the level of detail reflected in his reports, a two to three month delay is simply too great to satisfy the contemporaneity requirement of Fed.R.Evid. 803(6). *Cf. Mo. Pac. R. Co. v. Austin*, 292 F.2d 415, 423 (5th Cir. 1961) ("The more it is a part of the regular duties of a person to interview many people in many different companies on many varied situations, the more imperative is the necessity for an early recording."). Finally, the reports are laced with hearsay statements which would not be covered by the business records exception. *See Woods*, 234 F.3d at 986 ("[The] business records exception does not embrace statements contained within a business record that were made by one who is *not* a part of the business if the embraced statements are offered for their truth.") (internal quotation marks omitted).

[3] Deputy Joe Carrillo is not a plaintiff.

dispatched to the scene and transported the civilian to Doctor's Hospital.

Prior to this time, the civilian had been drinking in a bar next to the parking lot where the Plaintiffs were conducting their investigation. According to Plaintiffs, the civilian was visibly intoxicated when he exited the bar. Plaintiffs claim that the civilian repeatedly tried to talk to the suspects they were detaining and taunted Plaintiffs to free the suspects or arrest them.

At some point after 1:30 a.m., Watch Commander Abel Moreno ("Moreno") received a call from a LAPD sergeant who informed him that she was at Doctor's Hospital and a patient was alleging that he had been assaulted by a deputy sheriff. By this point, Sgt. Burke had returned to the Station. Having been informed of the civilian's allegations at the scene, Sgt. Burke notified Watch Commander Moreno. Together, they responded to Doctor's Hospital, verified the civilian's physical injuries to his head and back, and took a videotaped statement from the civilian.[4]

The civilian told Sgt. Burke and Watch Commander Moreno that he was assaulted by a deputy sheriff – the civilian indicated that there were no stripes on the assailant's sleeves – while he was walking near Union Pacific Avenue and Indiana Street. The civilian also told them that he did not think there were any witnesses.

As a result of the civilian's complaint, the Department's Internal Affairs Bureau ("IAB") began an internal investigation into the matter. Watch

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[4] The videotaped interview took place at approximately 3:50 a.m.

Commander Moreno subsequently contacted Captain Thomas Angel ("Angel") at home and informed him of the civilian's allegation and injuries.

After IAB investigators contacted the civilian at Doctor's Hospital, it was determined that investigators from the Department's Internal Criminal Investigations Bureau ("ICIB") should become involved in the investigation.[5]

At some point between 5:30 a.m. and 6:00 a.m., Plaintiffs were directed to return to the Station and wait until investigators arrived. When Plaintiffs returned to the Station, they were advised or told by Watch Commander Moreno that they should remain at the Station until they could be interviewed by Department investigators.[6]

The Department has two separate internal investigations units: IAB, which investigates administrative allegations, and ICIB, which investigates criminal allegations. Plaintiffs were aware of the difference on September 5, 2002.

By 6:00 a.m., Defendants had determined that the civilian's allegations would be investigated by ICIB. At around this same time, Sgt. Burke and Watch Commander Moreno told Plaintiff Aguilera that the

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[5] Plaintiffs' supplemental statement of facts includes details of the IAB investigators' interview with the civilian. However, since these details derive from hearsay statements contained in the inadmissible police reports, they are inadmissible.

[6] Plaintiffs claim that they were advised that the investigation was "going criminal," which they understood to mean that investigators from ICIB would be coming to the station to interview them. Although Defendants dispute this claim, the Court accepts Plaintiffs' testimony on this point.

civilian's allegations would be investigated criminally.

Sometime before 7:00 a.m., Captain Angel telephoned Commander Neal Tyler ("Tyler") to discuss the allegations.[7] Captain Angel related the information he obtained from Sgt Moreno. Captain Angel also told Commander Tyler that the deputies would be at the station until they could be interviewed by ICIB investigators.

Between approximately 7:00 and 7:45 a.m., ICIB Lt. Allan Smith ("Smith") called ICIB Sgt. James Russell Kagy ("Kagy") at home, informed him of the nature of the investigation, and ordered him to report to ICIB to conduct an investigation.

At about 8:00 a.m., Sgt. Kagy and his partner, Deborah Jones, reported to ICIB, where they received a briefing from Lt. Smith. Lt. Smith told Sgt. Kagy that the assault occurred in the vicinity of a narcotics investigation at Union Pacific Avenue and Indiana Street and identified by name the deputies who had been involved in the investigation. Sgt. Kagy and Jones then began a preliminary investigation and proceeded directly to Doctor's Hospital to contact the civilian.

After arriving at Doctor's Hospital, Sgt. Kagy learned that the civilian had been released and was with IAB Sgt. Darryl Meeks ("Sgt.Meeks"). Sgt. Kagy proceeded to the civilian's location, received a briefing from Sgt. Meeks, and interviewed the civilian. The civilian told Sgt. Kagy that he had been hit several times in the back of the head and several other places by a deputy while he was walking on

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[7] At the time, Commander Tyler was the Acting Chief of Field Operations Region One.

Union Pacific Avenue near Indiana Street and that the assault had occurred after a verbal exchange between the civilian and a deputy.

Sgt. Kagy then accompanied the civilian to the scene of the alleged assault. At the scene of the alleged assault, the civilian provided Sgt. Kagy with a reenactment of how the assault occurred, including a description of where the involved deputy was prior to the assault, the location of the pay phone from which the civilian called 911, and a description of the uniform ("beige and green with no stripes on the sleeve") that the deputy was wearing. As soon as Sgt. Kagy finished his preliminary investigation and interview of the civilian at the scene, he went directly to the Station to interview Plaintiffs. He arrived at the Station shortly before 11:30 a.m.

When Plaintiffs and Deputy Joe Carrillo returned to the Station between 5:30 and 6:00 a.m., they initially gathered in the Station's report writing room. However, at some point between 5:30 a.m. and 6:30 a.m., some of the Plaintiffs were moved to the basement briefing room. During this time, Plaintiffs were under the supervision of other sheriff's department personnel, although Plaintiffs' deposition testimony indicates that the supervision was less than constant.[8]

At approximately 6:30 a.m., Plaintiffs were directed to go to Captain Angel's office. According to Plaintiffs, Captain Angel pointed at Plaintiffs and told them in a "harsh, accusatory tone" that (1) he

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[8] For instance, Plaintiff Aguilera states that she only spent about fifteen minutes in the report writing room, with the rest of the time spent in the locker room and the secretary's office. (Aguilera Depo. 12:16-13:2.)

knew one of them had assaulted the civilian, (2) the others were covering it up, (3) one or more of them would be going to prison and would lose their jobs, and (4) the only way to avoid going to jail was to "come forward" by giving a statement to ICIB investigators. Captain Angel concluded by ordering Plaintiffs not to leave the Station and to wait in the COPS Team office until they gave a statement to the ICIB investigators.[9]

For the next five hours, Plaintiffs waited in the COPS Team office. During this time, Plaintiffs were supervised by either Lt. Wagner or Sgt. Proctor, both of whom were uniformed and armed, as were Plaintiffs. While Plaintiffs claim that the supervision was constant, their deposition testimony indicates that the supervision was somewhat more intermittent.[10] Moreover, while Plaintiffs claim that they were not allowed to get anything to eat or drink, their own testimony indicates that one or two of them used the water foundation and that either/both Lt. Wagner or/and Sgt. Proctor asked Plaintiffs if they wanted

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[9] Although Defendants dispute this claim, the Court accepts Plaintiffs testimony on this point.

[10] It appears that Lt. Wagner and Sgt. Proctor would periodically look in or walk into the office. For instance, Plaintiff Arellano stated that Sgt. Proctor simply "walk[ed] in, survey[ed], look[ed] at all of us, [and] walk[ed] out." (Arellano Depo. 69:2-5.) Likewise, Plaintiff Ramirez offered the following account of Lt. Wagner's activities:

> [She] [t]alked to Sgt. Burke, looked at some papers from Sgt. Burke, [we] listened to her tell us about the bathroom and tell us about if we want anything to eat or drink, she'll get it for us, [we] watch[ed] her poke her head in a couple of times and leave. That's about it.

(Ramirez Depo. 76:19-77:3.)

anything to eat or drink.[11] In addition, Plaintiffs were permitted to use the restroom without an escort and were never placed in handcuffs.

During this time, Plaintiffs were not put through the Department's booking or arrest procedures and were not prevented from telephoning their attorney.[12] In addition, Plaintiffs remained in possession of their LASD-issued equipment, including their weapons, and personal belongings. Indeed, several of the Plaintiffs remained in uniform.[13]

Between approximately 11:30 a.m. and 12:00 p.m., Sgt. Kagy questioned each Plaintiff individually. Sgt. Kagy asked each Plaintiff if he or she would provide him with a statement, and each declined based on the advice of counsel.[14] After each Plaintiff declined to provide a statement, Sgt. Kagy terminated the interview and Plaintiffs left the Station shortly thereafter.

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[11] For instance, Plaintiff Aguilera testified that Sgt. Proctor asked Plaintiffs if anyone was hungry and that Sgt. McLeod asked if anyone wanted anything to eat or drink. (Aguilera Depo. 68:1-8;68:23-69:7.) Likewise, Plaintiff Ramirez testified that Lt. Wagner asked Plaintiffs if they wanted anything to eat or drink. (Ramirez Depo. 76:19-77:3.) In addition, Plaintiff Arellano testified that he "stopped briefly to use [the water fountain]." (Arellano Depo. 75:21-25.) Plaintiff Bardon also testified that he "might have drank some water out of the water fountain." (Bardon Depo. 77:2-3.)

[12] At 11:00 a.m. one of the Plaintiffs used a cell phone to contact their attorney.

[13] Plaintiff Aguilera changed out of her uniform and placed her duty weapon in her locker before being ordered to wait for the investigators.

[14] Sgt. Kagy told Plaintiffs Bardon, Carrillo, Ramirez, and Arellano that they were not suspects but could not be eliminated as suspects.

Prior to leaving, each Plaintiff filled out an overtime slip. Plaintiffs were subsequently paid their normal overtime pay for the approximately six hours they were held at the Station beyond the scheduled end of their shift.

When each Plaintiff reported for his or her next shift after September 5, 2002, Lt. Smith informed him or her that his or her shift was being changed effective immediately. Plaintiffs were also pulled from patrol duty. Plaintiffs were not restored to field duty until October 2003.

Plaintiffs claim their duties and shifts were changed in retaliation for their refusal to answer Sgt. Kagy's questions. They maintain that their original shifts and duties were restored in October 2003, not because they had been cleared of wrongdoing, but because they had finally given statements to the investigators. Defendants argue in response that Plaintiffs' duties and shifts were changed as a result of the internal investigation.

On September 5, 2002, Plaintiffs were experienced deputy sheriffs. Plaintiff Bardon became a sworn deputy with the Department in 1981. Plaintiff Aguilera became a sworn deputy in 1990. Plaintiff Ramirez became a sworn deputy in 1995. Plaintiff Arellano became a sworn deputy in 1989. Plaintiff Gus Carrillo became a sworn deputy in 1996. As a result of their experience with the Department, Plaintiffs were familiar with the Department's policies and practices regarding placing individuals under arrest.

III. LEGAL STANDARD

A. Summary Judgment

Fed.R.Civ.P. 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, if the moving party will not bear the burden of proof at trial, it may satisfy its burden at summary judgment by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Fed.R.Civ.P. 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

See Anderson, 477 U.S. at 248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

B. Qualified Immunity

In a suit against an officer for an alleged violation of a constitutional right, the court must consider, as a threshold matter, whether the officer is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Qualified immunity is appropriate if the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct did not violate a clearly established constitutional right. *Id.* at 201, 121 S.Ct. 2151; *Jeffers v. Gomez*, 267 F.3d 895, 909 (9th Cir. 2001).

In ruling on a motion for summary judgment based on qualified immunity, a court must engage in two-step inquiry. *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004). First, the court must determine whether the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right. *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003) (quoting *Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272). Second, the court must determine whether the right was "clearly established." *Id.*[15]

A right is clearly established for purposes of qualified immunity when a reasonable officer, faced with the circumstances the officer confronted, would have known that the conduct attributed to the officer was unlawful. *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151, 150 L.Ed.2d 272. In determining whether the right

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[15] Of course, if the officer's conduct did not violate the plaintiff's constitutional rights, the inquiry is at an end. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151, 150 L.Ed.2d 272.

was clearly established, a court must define the right with sufficient particularity, keeping in mind the specific set of circumstances the officer encountered. *Id.* at 201-02, 121 S.Ct. 2151.

IV. DISCUSSION

Defendants move for summary judgment with respect to Plaintiffs' Fourth Amendment, Fifth Amendment, Fourteenth Amendment, conspiracy, and municipal liability claims. Defendants maintain that Plaintiffs' rights were not violated and that, even if they were, the law was not clearly established at the time that Defendants' conduct constituted a violation of Plaintiffs' constitutional rights. Plaintiffs oppose.

A. Fourth Amendment

1. Legal Principles

The Fourth Amendment protects citizens against "unreasonable searches and seizures." U.S. Const. amend. IV. "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S.Ct. 1843 (2003) (internal quotations omitted). Thus, an encounter between an officer or other government official and an individual "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991).

Though an individual need not be arrested in order for a seizure of the person to have occurred[16], the restraint on liberty typically must be effected by physical force or a show of lawful authority. *California v. Hodari D.*, 499 U.S. 621, 626-27, 111 S.Ct. 1547 (1991); *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879 n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred"). The Ninth Circuit considers five factors in determining whether a

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[16] There are two types of seizures under the Fourth Amendment: (1) investigatory stops or detentions and (2) arrests. *Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995). An investigatory stop or detention occurs when an officer briefly seizes an individual for questioning based upon a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637 (1979). The Fourth Amendment allows such stops "so long as [the police] have a reasonable, articulable suspicion that justifies their actions." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002).

In contrast to an investigatory stop or detention, a full-scale arrest must be supported by probable cause. *Allen*, 73 F.3d at 236. "There is no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest." *Gallegos*, 308 F.3d at 991 (internal quotation marks omitted). Rather, a court must consider the totality of the circumstances. *Allen*, 73 F.3d at 235. In particular, a court must consider not only how intrusive the stop was but "whether the methods used by the police were reasonable *given the particular circumstances*." *Gallegos*, 308 F.3d at 991 (internal quotation marks omitted) (emphasis in original). There is no "'mechanical checklist'" to distinguish between investigatory stops and arrests, *id.* (quoting *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988)), and there is "'no rigid time limit[]'" on investigatory stops. *Id.* at 992 (quoting *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568 (1985)).

show of force amounted to a seizure: (1) the number of officers, (2) whether weapons were displayed, (3) whether the encounter occurred in a public or non-public setting, (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled, and (5) whether the officers advised the detainee of his right to terminate the encounter. *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004); *accord Kaupp*, 538 U.S. at 630, 123 S.Ct. 1843 (identifying several factors or indicia which might indicate the existence of a seizure, "including 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled'") (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980)).

The application of the Fourth Amendment to the employment context presents special issues. This is because a court, in determining whether a seizure has occurred, must be attuned to the fact that an individual's voluntary choices may give rise to a limitation on his freedom that does not equate to a seizure by law enforcement. For instance, the mere fact that an employee does not flee his place of work when police officers arrive to conduct an investigation does not mean that the employee has been seized for purposes of the Fourth Amendment. As the Supreme Court has noted, "[W]hen people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 U.S. 210, 218, 104 S.Ct. 1758 (1984).

This principle is no less applicable in the public employment context. As one court has put it, "[T]he obligation to remain at work does not become less voluntary when owed to a public agency." *Rossi v. Town of Pelham*, 35 F.Supp.2d 58, 71 (D.N.H. 1997). Accordingly, while it is well-established that "searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment," *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492 (1987), it is reasonably clear that "the possibility or even probability of adverse employment action – as opposed to physical detention – cannot enter [the] analysis" as to whether a government employee has been seized. *Driebel v. City of Milwaukee*, 298 F.3d 622, 642 (7th Cir. 2002). Thus, "in cases involving the constitutional rights of police officers, courts must distinguish between a police department's actions in its capacity as an employer and its actions as the law enforcement arm of the state." *Id.* at 637.

Of course, the mere fact that a seizure has occurred does not mean that a violation of the Fourth Amendment has. *See Moreno v. Baca*, 400 F.3d 1152, 1156 (9th Cir. 2005) ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."). A seizure violates the Fourth Amendment only if it was objectively unreasonable under the circumstances. *Doe v. State of Haw. Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003).

In order to be reasonable within the meaning of the Fourth Amendment, an arrest must be based on probable cause. *Allen*, 73 F.3d at 236. Probable cause exists "when the facts and circumstances

within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'" *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990) (quoting *Mich. v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627 (1979)). Probable cause must be determined at the time of the arrest; evidence obtained later or as a result of the arrest cannot be used to support the existence of probable cause. *Allen*, 73 F.3d at 236.

In order to be reasonable, an investigatory stop must be based on a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown*, 443 U.S. at 51, 99 S.Ct. 2637. "The reasonable suspicion standard 'is a less demanding standard than probable cause,' and merely requires 'a minimal level of objective justification.'" *Gallegos*, 308 F.3d at 990 (quoting *Illinois v. William*, 528 U.S. 119, 123, 120 S.Ct. 673 (2000)). Nevertheless, the officer "must have a *particularized* suspicion of illegal activity." *United States v. Bravo*, 295 F.3d 1002, 1011 n. 8 (9th Cir. 2002) (emphasis added).

2. Analysis

a. Were Plaintiffs Seized Within the Meaning of the Fourth Amendment?

As a threshold matter, the Court must determine whether Plaintiffs were seized within the meaning of the Fourth Amendment. In making this determination, the Court is guided by the Seventh Circuit's decision in *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002), a case also involving allegations by experienced police officers that they had been unlawfully seized as part of an internal affairs investigation.

In *Driebel*, 298 F.3d at 627, four police officers alleged that they had been seized within the meaning of the Fourth Amendment "when they were ordered by superior officers to remain on duty or to accompany detectives to the [Milwaukee Police Department's] Internal Affairs Division and answer questions put to them during the course of criminal investigations of their activity while on duty in January and February 1998." Because the case involves two unrelated incidents involving four different officers, the court analyzed them separately.

On February 20, 1998, Officer Robert Driebel ("Driebel") was assigned to plainclothes duty during a daytime patrol shift from 7 a.m. to 3 p.m. *Id.* at 628. At 1:15 p.m., the MPD received an emergency call from the principal of a local elementary school that an "older kid" was "across the street bothering kids at the school." *Id.* Officer Driebel and his partner were dispatched to the scene. *Id.* Officer Driebel and his partner took a statement from the principal, who told them that two boys were making obscene gestures and statements to the students. *Id.* According to the principal, the boys fled and ran into a house across the street when she went to the playground to investigate. *Id.* Officer Driebel and his partner drove to the house. *Id.* When no one answered, they went back to the school to talk to students who had reportedly witnessed the incident. *Id.* After taking the statements, they returned to the house to monitor it. *Id.* Two boys matching the students' description exited the house and entered an adjoining alley. *Id.* Officer Driebel and his partner attempted to follow the boys by car, but when the boys took off running in opposite directions. *Id.* A chase ensued. *Id.* After losing one of the boys, Offi-

cer Driebel happened to spot him again. *Id.* Officer Driebel ordered the boy to stop, but the boy started to run away. *Id.* Officer Driebel started to chase him, but eventually grew tired and out of frustration threw his MPD-issued radio at the boy, striking him in the head. *Id.* Despite the injury, the boy kept running. *Id.* at 628-29. Later, the father of one of the boy filed a complaint with the MPD. *Id.* at 629.

After hearing the statements of the two boys, the investigating officer suspected that Officer Driebel was the individual who threw the radio. *Id.* After locating Driebel, he ordered Driebel to "stand by" in the police garage until given further instructions. *Id.* Driebel obeyed, waiting in the garage for what ultimately totaled four hours. *Id.* During this time, Driebel retained possession of his I.D. card, badge, and all police-issued equipment. *Id.* No one was assigned to monitor his presence, and there is no evidence Driebel was prevented from communicating with anyone during this time. *Id.* Moreover, Driebel subsequently received overtime pay for the time he was in the garage. *Id.*

In January 1998, Officers Brett Huston ("Huston"), Johnny Sgrignuoli ("Sgrignuoli"), and Stephen Pinchard ("Pinchard") were each assigned to the Gang Crimes Division of the MPD. *Id.* at 632. While on duty on January 21, Huston and Pinchard made a traffic stop of a vehicle for failing to stop at a traffic signal. *Id.* One of the four passengers was Miguel Ramos ("Ramos"), a Latino male known to have gang affiliations. *Id.* On January 23, MPD Assistant Chief Paul Koleas ("Asst. Chief Koleas") notified Deputy Inspector Dale Schunk ("Deputy Insp. Schunk") that two officers had pulled over a vehicle with four occupants, observed marijuana lying on the ground next

to the car, and allegedly threatened to arrest the occupants unless one of them agreed to obtain a single handgun for them. *Id.* That same day, the Internal Affairs Division ("IAD") learned that Ramos had filed a complaint containing substantially the same allegations. *Id.* After reviewing the relevant records, IAD concluded that Huston and Pinchard were involved in the Ramos traffic stop. *Id.* Ramos further informed the IAD detectives that Huston had paged him several times the following day. *Id.* at 632-33. At this point, the IAD launched an investigation to determine whether Huston or Pinchard might be guilty of the crime of misconduct in public office. *Id.* at 633.

In an attempt to determine the truth of the allegations, a sting operation was arranged for the early evening of January 29, 1998. *Id.* On that day, Huston, Pinchard, and Sgrignuoli were working the 5 p.m. to 1 a.m. shift on Milwaukee's south side. *Id.* As part of the sting, two handguns were placed in a dumpster on the corner of South 14th and West Mitchell. *Id.* At the instruction of the IAD, Ramos telephoned Huston and advised him that the guns were in the dumpster. *Id.* After receiving the information, Huston and Sgrignuoli drove to the location. *Id.* Sgrignuoli exited the squad car, retrieved the firearms, and placed them in the back end of the police car. *Id.* Upon observing the activity, two unmarked police cars pulled up. *Id.* Two officers exited the cars and immediately separated Huston and Sgrignuoli. *Id.*

One of the officers accompanied Sgrignuoli to the IAD offices at police headquarters in downtown Milwaukee. *Id.* at 633-34. Upon their arrival, the officer escorted Sgrignuoli to a room that was inac-

ccssible to the general public and relatively isolated from other parts of the building. *Id.* at 634. The two remained in the room for two hours before two other IAD detectives entered the room and read Sgrignuoli his *Miranda* rights. *Id.* The two officers then left, leaving Sgrignuoli alone with the officer. *Id.* Thirty minutes later, Deputy Insp. Schunk and three other IAD officers came in and informed Sgrignuoli that he was under investigation for MPD rule violations rather than criminal conduct. *Id.* Thereafter, Sgrignuoli was directed to leave and return to duty. *Id.* However, he requested to take the rest of the evening off, and his request was granted. *Id.* During the time he spent with the officer, Sgrignuoli asked what was happening; both times the officer refused to answer his queries. *Id.* Sgrignuoli was eventually paid for the time he spent waiting with the officer. *Id.*

The other officer accompanied Huston to the IAD offices. *Id.* Like Sgrignuoli, Huston was taken to an empty room, where he waited with the other officer for three hours. *Id.* at 635. The officer advised Huston that he was the subject of a criminal investigation, but refused to allow Huston to contact his attorney or union representative. *Id.* In addition, Huston was refused permission to use the bathroom unless accompanied by a detective. *Id.* After approximately three hours, an IAD detective entered the room and read Huston his *Miranda* rights. *Id.* Huston immediately requested an attorney. *Id.* Like Sgrignuoli, Huston was compensated for the time he spent with the officer. *Id.* Moreover, he was never relieved of the possession of his police-issued credentials and weapons, including his gun, I.D. card, and badge. *Id.*

Unlike his cohorts, Pinchard was allowed to drive himself to the IAD offices and go to the office on the third floor unaccompanied by any detective. *Id.* at 636. Moreover, almost immediately upon entering the office, Pinchard was read his *Miranda* rights and exercised his right to remain silent. *Id.* He remained in the room for thirty minutes, after which he was ordered to return to duty. *Id.*

In the end, the Seventh Circuit found that only one of the officers had been seized within the meaning of the Fourth Amendment. With respect to Officer Driebel, the court concluded that he had not been seized within the meaning of the Fourth Amendment when he was ordered to remain on "stand by" duty for three and a half hours in the garage. *Id.* at 642-43. In reaching its conclusion, the court noted that (1) no one prevented Driebel from leaving the garage, (2) Driebel received overtime pay, (3) Driebel retained possession of his police-issued equipment, including his gun, police identification card, badge, and locker room keys, and (4) there was no evidence that the MPD had created a coercive environment by isolating Driebel or reading him his *Miranda* rights or advising him that he was under criminal investigation. *Id.*

With respect to Officer Pinchard, the court had little difficulty finding that he was not seized within the meaning of the Fourth Amendment. *Id.* at 646. The court noted that he drove himself to the IAD offices, waited for only about thirty minutes, and was immediately returned to duty thereafter. *Id.* Under the circumstances, the court found his Fourth Amendment claim "without merit." *Id.*

With respect to Officer Huston, the court found that he had not been seized within the meaning of

the Fourth Amendment when he was accompanied to the IAD offices by the officer or when he was forced to wait for three hours at the IAD offices. *Id.* at 646-49. The court justified its conclusion that his initial encounter with the officer and drive to the IAD offices was not a seizure on the grounds that (1) the detectives made no display of their weapons, (2) the detectives did not speak in a menacing manner or make coercive statements, (3) Huston remained in possession of his MPD-issued equipment at all time, (4) Huston was not touched, and (5) Huston would have known, as a highly trained MPD officer, that MPD regulations provided that IAD detectives were vested with the power and authority to interview officers at any time and place but that force could not be used to force an officer to submit to an interview or prevent him from departing from one unless he was formally arrested. *Id.* at 646-47. The court in turn justified its conclusion that the Huston was not seized when he was required to wait three hours in the IAD office on the grounds that (1) Huston was not physically restrained, (2) Huston retained possession of his MPD-issued equipment, including his weapons, identification cards, and badges, and (3) Huston was compensated for the time he spent at headquarters. *Id.* at 647-48.[17]

With respect to Officer Sgrignuoli, the court found that he had been seized within the meaning of the

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[17] The court acknowledged that the denial of Huston's request to contact his attorney or union representative weighed against a finding of no seizure, but it ultimately discounted the significance of this fact. *Id.* at 648. Moreover, while the court found it troubling that Huston was not permitted to use the restroom without the presence of another detective, it ultimately discounted the significance of this fact. *Id.*

Fourth Amendment. *Id.* at 649. The court reached this conclusion based solely upon testimony that the officer who initially accosted Sgrignuoli physically grabbed him and turned him around. *Id.* In the court's view, a person in Sgrignuoli's position could have thought, based upon the officer's grabbing and turning him, that he was not free to leave. *Id.*

In light of *Driebel*, the Court concludes that Plaintiffs were not seized when they were ordered to remain at work to be questioned by ICIB investigators.[18] First, no force was used: Plaintiffs were never handcuffed, physically restrained, or placed in a holding cell. Second, the show of force was distinctly benign:

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[18] The Court does not find the facts of this case analogous to those in *Myers v. Baca*, 325 F.Supp.2d 1095 (C.D. Cal. 2004). First, unlike the trainees in *Myers*, Plaintiffs were experienced law enforcement officers. Second, unlike the trainees, Plaintiffs did not have their personal belongings opened up and searched. Third, unlike the trainees, Plaintiffs were not told not to speak to anyone, not to use their cell phones, not to eat or drink, and not to go to the restroom without an escort. Of course, unlike the trainees, Plaintiffs were told at the outset that they were under criminal investigation. The mere fact that a person is told he is under criminal investigation, however, does not suffice to give rise to a seizure where other factors weigh heavily against such a finding. In *Driebel*, for instance, Officer Huston was told shortly after he arrived that he was under criminal investigation. *Driebel*, 298 F.3d at 635. Nevertheless, the court found that no seizure had taken place. *Id.* at 646-49. Moreover, Plaintiffs were told they were under criminal investigation by a superior officer, not an ICIB officer. Finally, the fact that Captain Angel may have spoken in a harsh and accusatory tone does not alter the analysis. As one court has observed, "A supervisor may even use a harsh tone of voice and occasionally may 'order' an employee to do something. However, no one would think to argue in this situation that the employee was 'seized' under the Fourth Amendment." *Fedanzo v. Vroustouris*, 2001 WL 1242841, at *9 (N.D. Ill. Oct. 17, 2001).

only two officers supervised Plaintiffs, and their supervision of Plaintiffs appears to have been intermittent and not particularly intrusive. For instance, Plaintiffs were permitted to talk to one another, use their cell phones, drink from the water foundation, and use the bathroom unaccompanied by an escort.[19] Third, Plaintiffs retained possession of their LASD-issued equipment, *including their guns*. Under these circumstances, it cannot be concluded that Plaintiffs were arrested or seized.[20]

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[19] In contrast, Officer Huston was not permitted to contact his attorney or go to the bathroom unaccompanied by an escort.

[20] Indeed, the only factor which arguably weighs in favor of a seizure is the fact that Plaintiffs were told that they were under criminal investigation. However, as noted at *supra* note 18, Officer Huston was told shortly after he arrived at IAD offices that he was under criminal investigation. *Driebel*, 298 F.3d at 635. Nevertheless, the court there found that no seizure had taken place. *Id.* at 646-49. Moreover, unlike *Myers*, 325 F.Supp.2d at 1106, or *Driebel*, 298 F.3d at 635, Plaintiffs were told they were under criminal investigation by a superior, not an internal affairs' investigator. Thus, the argument for a seizure is even weaker here. Of course, Plaintiffs have may feared possible employment-related repercussions if they tried to leave, but fear of possible adverse job-related consequences cannot enter into the analysis of whether Plaintiffs were seized within the meaning of the Fourth Amendment. As the Seventh Circuit observed in *Driebel*, "[I]n cases involving the constitutional rights of police officers, courts must distinguish between a police department's actions in its capacity as employer and its actions as the law enforcement arm of the state." *Driebel*, 298 F.3d at 637. As an employer, a police department may, without violating the Fourth Amendment, order an officer to report for questioning at a designated, centralized area or some other suitable location. *Id.* Accordingly, the relevant inquiry under the Fourth Amendment is not whether a reasonable person in the officer's position would have feared for his or her job but whether he or she "would have feared *seizure or detention* if [he or she] had refused to obey the commands given by [his or her]

b. Was the Seizure Unreasonable?

Because the Court has concluded that no seizure occurred, it need not reach the issue of whether the seizure was reasonable.

B. Fifth Amendment

1. General Principles

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[21] As interpreted by the Supreme Court, the privilege against self-incrimination protects an individual against not only being compelled to testify against herself in a criminal proceeding but being forced to testify against herself in any other proceeding, criminal or civil, administrative or judicial, investigatory or adjudicatory, where her answers might incriminate her in a future criminal proceeding. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973); *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656 (1972).

An individual may be compelled to testify against herself, however, where the threat of future prosecution has been removed. *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 124 S.Ct. 2451, 2460-61 (2004); *see also Lefkowitz*, 414 U.S. at 84, 94 S.Ct. 316 (noting that testimony may be compelled if neither it nor its fruits are available for use). Accordingly, where the government grants

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superior officers." *Id.* at 642 (emphasis in original). Here, the evidence simply does not support the reasonableness of such fears.

[21] The Self-Incrimination Clause applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489 (1964).

a witness immunity from the future use of her testimony and any evidence derived from it, the government may compel the witness to testify against herself. *See Kastigar*, 406 U.S. at 453, 92 S.Ct. 1653; *see also Chavez v. Martinez*, 538 U.S. 760, 767-78, 123 S.Ct. 1994 (2003).

Where the government compels a witness to testify against herself without officially granting the witness immunity, the witness is nevertheless shielded; the government may not use her testimony or any evidence derived from it in any subsequent criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616 (1967). This immunity arises automatically and is co-extensive with the use and derivative use immunity mandated by *Kastigar*. *Chavez v. Martinez*, 538 U.S. at 769, 123 S.Ct. 1994; *see also Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n. 7 (4th Cir. 1995) (noting that the *Garrity* immunity, as it has become known, is self-executing).

2. The Fifth Amendment in the Public Employment Context

The application of the Fifth Amendment privilege against self-incrimination presents special problems when the witness is a government employee who is being called upon to testify to on-the-job or job-related misconduct which is also potentially criminal. In a series of cases involving the Fifth Amendment rights of public employees, the Supreme Court has made it clear that public employees "are entitled, like all other persons, to the benefit of . . . the privilege against self-incrimination." *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*, 392 U.S. 280, 284-85, 88 S.Ct. 1917 (1968). Nevertheless, these cases make it equally

clear that, as the Seventh Circuit has recently observed, "nothing in the [Fifth] Amendment endows public employees with greater workplace rights than those enjoyed by their counterparts in the private sector." *Driebel*, 298 F.3d at 637.

Because Plaintiffs' Fifth Amendment claim turns in large measure on a careful reading of these cases, the Court pauses to consider them. In *Garrity*, several New Jersey police officers were given the choice of either providing incriminating testimony or losing their jobs. *Garrity*, 385 U.S. at 497, 87 S.Ct. 616. The officers gave the incriminating testimony and were subsequently convicted based in part upon their testimony. *Id.* at 495, 87 S.Ct. 616.[22] On appeal, the Supreme Court held that the officers' testimony, because it had been given under the threat of discharge, was not voluntary and thus could not be used against them at trial. *Id.* at 497-500, 87 S.Ct. 616.

In *Gardner v. Broderick*, 392 U.S. 273, 274, 88 S.Ct. 1913 (1968), a New York patrolman was given the choice of either waiving his *Garrity* immunity and testifying before a grand jury or losing his job. When the patrolman refused to waive his immunity, he was discharged. *Id.* On appeal, the Supreme Court held that the officer could not be discharged for refusing to waive his immunity. *Id.* at 279, 88 S.Ct. 1913. *Accord Uniformed Sanitation Men*, 392 U.S. at 283-84, 88 S.Ct. 1917.

Taken together, *Garrity*, *Gardner*, and *Uniformed Sanitation Men* establish several propositions. First, *Garrity* establishes that testimony given under the

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[22] The trial court concluded that their statements were voluntary. *Id.* at 495 n. 2, 87 S.Ct. 616.

threat of discharge constitutes compelled testimony within the meaning of the privilege against self-incrimination and thus may not be used in a subsequent criminal prosecution. This is the so-called *Garrity* immunity which automatically attaches to compelled testimony. Second, *Gardner* and *Uniformed Sanitation Men* establish that a governmental employer may not get around the self-executing *Garrity* immunity by threatening to terminate an employee for refusing to waive her *Garrity* immunity prior to testifying. Third, both *Gardner* and *Uniformed Sanitation Men* make it clear that a governmental employer may terminate an employee for refusing to answer questions regarding the performance of her duties so long as the employer does not terminate or threaten to terminate the employee for refusing to waive her immunity. *See, e.g., Gardner*, 392 U.S. at 278, 88 S.Ct. 1913 ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.") (internal citation omitted); *Uniformed Sanitation Men*, 392 U.S. at 285, 88 S.Ct. 1917 ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional right."). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132 (1977) ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions

concerning their official duties if they have not been required to surrender their constitutional immunity.").

In a number of circuit cases within the last decade or so, these principles have been reaffirmed. In *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995), police officers and a police association brought a civil rights suit against an assistant state's attorney alleging that officers' constitutional rights were violated when they were compelled to take a lie detector test upon threat of job loss. Because the officers had not been asked to waive their privilege against self-incrimination, and the questions posed to them were narrowly job-related, the court held that the officers' Fifth Amendment rights had not been violated. *Id.* at 777. In explaining its decision, the court drew on *Gardner* and *Uniformed Sanitation Men*, noting that the language in those cases "strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege." *Id.*

The same result was reached by the Eighth Circuit in *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998), a case involving a sheriff's department officer who was terminated after he refused to answer questions about the disappearance of a photograph of a beaten detainee and failed to show up for a polygraph examination. The sheriff's department officer alleged that the sheriff had violated his Fifth Amendment rights when he discharged him for refusing to answer the questions and failing to take the polygraph examination. *Id.* at 471. The Eighth Circuit disagreed, concluding that the officer's allegations failed to

allege the violation of a clearly established Fifth Amendment right. *Id.* Drawing on *Garrity*, *Gardner*, and *Uniformed Sanitation Men*, the court explained that the Fifth Amendment is violated "only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers." *Id.* (emphases added). Thus, a public employer may put a public employee to the choice of either testifying about the performance of official duties or forfeiting her job "[a]s long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution." *Id.* Accordingly, since the officer had not been asked to waive his privilege against self-incrimination, his dismissal did not violate the Fifth Amendment. *Id.*[23]

Finally, and most recently, the Sixth Circuit held in *Lingler v. Fechko*, 312 F.3d 237 (6th Cir. 2002), that a police officer's Fifth Amendment rights were not violated when he was ordered to prepare a report detailing his involvement in the disappearance of some of the department's furniture. Citing *Wiley*, the court held that no Fifth Amendment violation had occurred because the officer had not been compelled to waive his privilege against self-incrimination and because his statements were never used against him in a subsequent criminal proceeding. *Id.* at 239-40.

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[23] In rejecting the officer's claims, the court also rejected the officer's argument that the sheriff's mere failure to expressly offer immunity constituted an impermissible attempt to compel a waiver of immunity. *Id.*

3. Analysis

In light of the teachings of *Garrity*, *Gardner*, and *Uniformed Sanitation Men* and such recent cases as *Lingler*, *Hill*, and *Wiley*, Plaintiffs' Fifth Amendment claim cannot stand. Plaintiffs were not compelled to answer Sgt. Kagy's questions or to waive their immunity.[24] Since, as the Eighth Circuit has explained, the Fifth Amendment is violated "only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers," *Hill*, 160 F.3d at 471, no Fifth Amendment violation occurred here.

Nor does the mere fact that the Department may have altered Plaintiffs' shifts or job duties in response to their refusal to answer Sgt. Kagy's questions give rise to an actionable Fifth Amendment claim. As the *Garrity* line cases make clear, a public employer may take adverse employment actions against a public employee who refuses to answer questions narrowly tailored to the performance of her job duties. So long as the employer is not penalizing the employee's refusal to waive her immunity or attempting to compel the employee to waive her immunity, no violation of the Fifth Amendment has occurred. In this case, Plaintiffs were never asked to waive their immunity, and indeed never did waive their immunity. Accordingly, no Fifth Amendment violation occurred.

Moreover, Plaintiffs' Fifth Amendment claim fails for an additional reason: since Plaintiffs were never charged with a crime, let alone tried for one, no use

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[24] Moreover, Sgt. Kagy's questions were narrowly tailored to the performance of their job duties.

of their statements has ever been made. In *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994 (2003), the Supreme Court held that a violation of the Self-Incrimination Clause does not occur absent the use of the compelled testimony in a criminal case.[25] Therefore, since Plaintiffs have never been charged with a crime, let alone tried for one, their Fifth Amendment claim must fail under *Chavez*.[26]

C. Fourteenth Amendment

Plaintiffs allege two violations of the due process clause of Fourteenth Amendment. First, Plaintiffs allege that Defendants violated their right to be free from coercive police interrogations. Second, Plaintiffs allege that Defendants violated their right to be free from governmental conduct that shocks the conscience.

Neither of these claims is properly analyzed under the due process clause of the Fourteenth Amendment. As the Supreme Court has repeatedly held,

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[25] In reaching this judgment, the Court rejected the view that the use of compulsive questioning, standing alone, violates the Fifth Amendment. *Id.* at 766-73. In an opinion joined by the Chief Justice and Justices Scalia and O'Connor and which expressed the judgment of the Court, Justice Thomas reached this conclusion based on a close reading of the text of the Fifth Amendment and the Court's prior case law. *Id.* In a concurring opinion joined by Justice Breyer, Justice Souter reached this conclusion by carefully balancing the costs and benefits of adopting the Ninth Circuit's rule. *Id.* at 777-79 (Souter, J., concurring). Whatever the rationale, however, the Court squarely rejected the view that compulsive questioning by itself can violate the Fifth Amendment.

[26] Although the Ninth Circuit has limited the application of *Chavez* to § 1983 cases, *see United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005), this is a § 1983 case and is thus governed by *Chavez*.

"Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865 (1989)) (internal quotation marks omitted). *See also United States v. Lanier*, 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219 (1997) (explaining that where a "constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Fontana v. Haskin*, 262 F.3d 871, 881-82 (9th Cir. 2001) (rejecting the plaintiffs' substantive due process claim because her claim was better analyzed under the Fourth Amendment).[27] Thus, since Plaintiffs' claims are covered by the Fourth and Fifth Amendments, they must be analyzed under the Fourth and Fifth Amendments, as the Court did above. Nevertheless, even if analyzed under the Fourteenth Amendment, Plaintiffs' claims fail.

1. *Right to be Free from Coercive Police Interrogations*

Plaintiffs assert that Defendants violated their right to be free from coercive police interrogations.[28]

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[27] Of course, where a plaintiff's claim is not covered by a specific constitutional provision, it is properly analyzed as a substantive due process claim. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708 (1998).

[28] Under Ninth Circuit precedent, a coercive interrogation exists where "the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his

In making this claim, Plaintiffs rely on *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

In *Cooper*, the Ninth Circuit held that the plaintiff stated a cause of action under § 1983 for a violation of his right to be free from coercive police interrogations where he alleged that the police had interrogated him for hours without properly administering the *Miranda* warning and without heeding his repeated requests to remain silent. *Id.* at 1244-48. The facts indicated that the police conducted the unlawful interrogation in a deliberate and premeditated attempt to extract statements which, even if not admissible as part of the prosecution's case-in-chief, would deter the plaintiff from testifying or invoking an insanity plea and would have served as fodder for impeachment if the plaintiff had elected to testify. *Id.*

As even this cursory summary of *Cooper* indicates, the facts of this case are dramatically different. Unlike the officers in *Cooper*, Sgt. Kagy did not interrogate Plaintiffs for hours. At most, he questioned them for a few minutes. Nor did Sgt. Kagy ignore repeated requests by the Plaintiffs to remain silent; on the contrary, he terminated the questioning as soon as Plaintiffs invoked their Fifth Amendment rights. Under the benchmark established by *Cooper*, Plaintiffs' allegations simply do not rise to the level of coercion necessary to state a claim for coercive police questioning. *Cf. Cunningham v. City of Wenatchee*, 345 F.3d 802, 810-11 (9th Cir. 2003) (holding that an eight-hour interrogation did not rise

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free will." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003).

to the level of a coercive interrogation where the plaintiff was given a break for food and water).

2. Right to be Free from Government Conduct That Shocks the Conscience

The Supreme Court has held that governmental conduct which shocks the conscience violates the due process clause of the Fourteenth Amendment. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952). The threshold question in such cases is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708 (1998). The type of conduct which is most likely to rise to the "conscience-shocking level" is "conduct intended to injure in some way unjustifiable by any government interest." *Id.* at 849. Nevertheless, conduct which was not intentional may rise to the conscience-shocking level in some circumstances. *Id.* at 849-50 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979 (1983)).

In *Cooper*, the Ninth Circuit found that the plaintiff stated a viable claim under § 1983 that the defendants had violated his right to be free from governmental conduct that shocks the conscience. *Cooper*, 963 F.2d at 1248-50. But as detailed above, the facts here bear no comparison to those alleged in *Cooper*. Moreover, even apart from *Cooper*, the facts here do not shock the conscience. Simply put, Sgt. Kagy's conduct in questioning Plaintiffs for several minutes but immediately terminating the questioning upon their invocation of their Fifth Amendment rights is not so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.

Accordingly, Plaintiffs' shock-the-conscience claim fails.

D. Clearly Established Nature of the Right

1. Legal Principles

Because the Court has determined that Defendants did not violate Plaintiffs' Fifth Amendment or Fourteenth Amendment rights, the Court need not turn to the second step of the two-part analysis set forth by the Supreme Court in *Saucier*: whether the law regarding the constitutional right violated by Defendants was clearly established at the time of the constitutional violation. *Saucier*, 533 U.S. at 200. *See also Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003). Nevertheless, the Court will undertake the "clearly established" inquiry simply to illustrate that Defendants' conduct, even if violative of Plaintiffs' constitutional rights, did not violate clearly established rights.

As the Supreme Court has repeatedly emphasized, the "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Indeed, "'the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987)). In other words, "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. If a reasonable officer "could have reasonably but erroneously believed that his or her conduct did not violate

[Plaintiffs'] rights," then qualified immunity must be granted. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

The officer's conduct is measured according to the state of the law as of the date of events giving rise to the lawsuit-that is, "officials are charged with knowledge of constitutional developments at the time of the alleged constitutional violation." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057, 110 S.Ct. 867 (1990). In determining whether the law was clearly established at such time, a court "need not look to a case with identical or even 'materially similar' facts." *Serrano*, 345 F.3d at 1077 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739-41, 122 S.Ct. 2508 (2002)). "[S]tate officials are not entitled to qualified immunity simply because no case with materially similar facts has held their conduct unconstitutional. The standard is one of fair warning: where the contours of the right have been defined with sufficient specificity that a state official had fair warning that her conduct deprived a victim of his rights, she is not entitled to qualified immunity." *Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003) (citations omitted).

"A right can be clearly established even though there was no binding precedent in this circuit" at the time of the alleged violation. *Lum*, 876 F.2d at 1387. Where there is no binding precedent, courts in the Ninth Circuit "look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Id. Accord Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996); *Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1985). If there is no on-point

Ninth Circuit authority and are few other cases on point, then a court may "evaluate the likelihood that this circuit or the Supreme Court would have reached the same result as courts that had already considered the issue." *Lum*, 876 F.2d at 1387. *Accord Osolinski*, 92 F.3d at 936; *Figueroa*, 7 F.3d at 1409.

Finally, it should be noted that several cases have indicated that a court's analysis in determining whether a constitutional violation has occurred is relevant to determining whether the right was clearly established – that is, if the court's analysis reveals that the question of whether a constitutional right has been violated is a close one, that is a factor that weighs in favor of a finding that the right in question was not clearly established. *Mena v. City of Simi Valley*, 332 F.3d 1255, 1266 (9th Cir. 2003); *Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004).

2. Analysis

a. Plaintiffs' Fourth Amendment Right to be Free from Unreasonable Seizures

i. Was it clearly established that Defendants' conduct constituted a seizure?

Even if the Court had found that a seizure took place, it would not necessarily follow that it was clearly established at the time that Defendants' conduct in this context constituted a seizure. Indeed, as the Court noted above, the Seventh Circuit held in *Driebel* that Huston had not been seized even though he had been advised that he was under criminal investigation. *Driebel*, 298 F.3d at 635, 646-49. Moreover, to the extent that *Driebel* held that Huston had not been seized because (1) he had not been physically restrained, (2) he retained possession

of his department-issued equipment, and (3) he was compensated for the time he spent at headquarters, *id.* at 647-48, a reasonable officer would have concluded, based on *Driebel*, that Defendants' conduct here did not constitute a seizure. Accordingly, it was not clearly established at the time that Plaintiffs were seized within the meaning of the Fourth Amendment.[29]

ii. Did Defendants' conduct in seizing Plaintiffs violate a clearly established right?

Even if the Court had found that an unreasonable seizure had taken place, it would not necessarily follow that Defendants violated a clearly established right. Indeed, the facts of this case are so unusual, and the case law involving the existence of probable cause in analogous situations is so unsettled, that it simply was not clearly established at the time that Defendants conduct violated a clearly established right.[30]

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[29] The Court notes that this Court's decision in *Myers* had not been decided at the time of the events of this case.

[30] The Court assumes, for the sake of argument, that Plaintiffs' detention, if it constituted a seizure, constituted an arrest. Nevertheless, the Court notes that there are "'no rigid time limit[s]'" on investigatory stops, *see Gallegos*, 308 F.3d at 992 (quoting *Sharpe*, 470 U.S. at 685, 105 S.Ct. 1568); *cf. United States v. Hbaiu*, 202 F.Supp.2d 1177, 1184-85 (D. Kan. 2002) (finding that a one hour, forty-five minute detention was an investigatory stop), and that the conduct at issue here, though intrusive in terms of time, was not particularly intrusive in terms of space or the methods used. Although Plaintiffs were confined to a particular location, they were free to use the restroom without an escort and were not prevented from using their cell phones. Moreover, they were not touched, searched, handcuffed, or placed in a holding cell. Finally, there is no evidence that Sgt. Kagy purposefully delayed his investigation, and in-

To be reasonable, an arrest must be supported by probable cause. *Allen*, 73 F.3d at 236. Probable cause exists "when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'" *Barry*, 902 F.2d at 773 (quoting *DeFillippo*, 443 U.S. at 37). Of course, probable cause does not require certainty. "[A]s the very name implies, we deal with probabilities [in dealing with probable cause]." *Brinegar*, 338 U.S. at 175; *see also Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795 (2003) ("The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities . . . ."). Whether an arrest was supported by probable cause is judged based on what was known at the time of the arrest; evidence obtained later or as a result of the arrest cannot be used to support the existence of probable cause. *Allen*, 73 F.3d at 236.

At the time of Plaintiffs' alleged seizure, Defendants had the following facts in their possession: (1) Plaintiffs had participated in a narcotics investigation near the intersection of Union Pacific and Indiana Avenues in East Los Angeles at around 1:30 a.m., (2) a civilian telephoned the LAPD at about 1:40 a.m. to report that a single male deputy, possibly Hispanic, had crossed Union Pacific and struck him with a flashlight in the back and head, and (3) Sgt. Burke and Watch Commander Moreno had verified the civilian's physical injuries to his head

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deed Plaintiffs were interviewed by him shortly after he got to the Station.

and back and had obtained a videotaped statement from the civilian.

Taken together, these facts certainly made it more likely than not that one of the deputies was the assailant. Indeed, given the fact that there is no evidence that other deputies were in the vicinity at that time, simple logic dictates that one of the deputies *had* to have been the assailant.[31] Nevertheless, the civilian's description was vague, and the specificity of a victim's description is one of the factors which informs the probable cause determination. *Cf. Washington v. Lambert*, 98 F.3d 1181, 1190-91 (9th Cir. 1996) (stating the same proposition with respect to reasonable suspicion; by implication, it applies to probable cause).[32] The question thus becomes whether a reasonable officer would have known that the circumstantial evidence which Defendants had in their possession, namely, that the deputies were the only deputies in the vicinity at that time – did not suffice to establish probable cause with respect to all of the deputies given the fact that the civilian's description was too vague to establish probable cause with respect to them.

While it is true that, as Plaintiffs note, that it was clearly established at the time that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to

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[31] While one of the Plaintiffs is a woman, she is Hispanic, was in uniform, and did participate in the narcotics investigation at that location. Moreover, it was night time.

[32] In a case decided after the facts at issue in this case, the Ninth Circuit squarely held that a general resemblance to a vague description cannot, as a matter of law, give rise to probable cause. *Grant v. City of Long Beach*, 315 F.3d 1081, 1088 (9th Cir. 2002).

probable cause," *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338 (1979), Plaintiffs were not suspects because they were in the proximity to others independently suspected of criminal activity; they were suspected because they were in the immediate vicinity and generally matched the description provided by the civilian. Thus, *Ybarra* is not directly on point.

Nor is Plaintiffs' attempt to analogize this case to *United States v. Brown*, 951 F.2d 999 (9th Cir. 1991), convincing. In that case, the Ninth Circuit held that membership in a corrupt police unit does not, without more, establish probable cause to arrest an individual officer within that unit. *Id.* at 1003. In this case, however, Plaintiffs were not suspects because of their membership in a particular unit; they were suspects because they were in the immediate vicinity of the assault and because they each generally matched the civilian's description.

Instead, the Court finds the Ninth Circuit's decision in *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986), and the Supreme Court's decision in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795 (2003), instructive.[33] In *Rutherford*, the plaintiff alleged that he had been assaulted and battered by several police officers. *Id.* at 1445. The officers did not deny arresting the plaintiff or being at the scene, but they did deny beating him. *Id.* At trial, the plaintiff was unable to identify which of the defendants actually kicked or punched him but did testify

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[33] Plaintiffs attempt to distinguish *Rutherford* on the ground that it arose in the context of a directed verdict. However, while the standard for a directed verdict is not identical to the standard for probable cause, both turn on what a reasonable person could infer from the facts. Thus, the posture in which *Rutherford* arose does not preclude its application here.

to seeing them around him at the time of the beating. *Id.* At the close of the plaintiff's case, the district court directed a verdict in favor of the defendants. *Id.* at 1445-46. On appeal, the Ninth Circuit reversed. *Id.* at 1448. Noting that the plaintiff had testified to seeing the officers at the time of the beating and that the "officers agreed that they were among the five or six officers who detained, arrested, and handcuffed [the plaintiff]," the court explained that "a jury could reasonably infer that the named officers were participants in punching or kicking [the plaintiff]." *Id.*

Here, as in *Rutherford*, the civilian could not identify which deputy struck him. Nevertheless, the civilian described his attacker as a deputy sheriff, and Plaintiffs and Deputy Joe Carrillo were the only deputies on the scene at the time.[34] To be sure, there is a distinction between the facts of *Rutherford* and the instant case: there, the officers were in the plaintiff's immediate presence at the time of the alleged assault, and the plaintiff was able to identify which officers were surrounding him at the time. Here, by contrast, the civilian testifies to only one deputy being in his immediate presence, and is unable to identify which one. Nevertheless, the facts of the two

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[34] Some of the Plaintiffs have submitted affidavits indicating that they were inside the residence being searched for part of the time. However, as it is not clear when the civilian was hit or when Plaintiffs were inside the residence, their declarations do not alter the analysis. Moreover, only those facts which the Department or Sgt. Kagy knew at the time are relevant to the probable cause inquiry. Plaintiffs have not shown that this information was known to the Department or Sgt. Kagy at the time.

cases do bear a resemblance.[35] In *Pringle*, an officer discovered drugs and a large quantity of cash in a car with three occupants.[36] *Id.* at 368. When the officer was unable to determine which of the three occupants owned the money and drugs, he arrested all three. *Id.* at 368-69. Subsequently, one of the passengers confessed to owning the drugs and money, and was convicted. *Id.* at 369. On appeal, the Supreme Court held that the officer had probable cause to arrest the passenger. *Id.* at 371-72. The Court explained:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle commit-

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[35] While the Ninth Circuit held in *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002), that *Rutherford* does not permit "an inference of individual liability . . . based on merely being present at the scene of [a] search," that case is distinguishable. In that case, there was *no* description of the officer who committed the alleged constitutional violation. The *only* evidence consisted of the fact that the officers were present at the scene. Here, by contrast, there was a description, one which Plaintiffs generally matched.

[36] Although *Pringle* was decided after the events at issue in this occurred, the fact that the Court granted certiorari in that case suggests that the existence of probable cause in a *Pringle*-like situation was unclear at the time. Indeed, as a leading treatise on Section 1983 indicates, "[t]he reach of the Court's decision in [*Pringle*] is uncertain." 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 3.19[B], at 3-636.3 (4th ed. 2005-2 Supplement). Finally, to the extent that the facts of the instant case are even more unique than those at issue in *Pringle*, it can hardly be said that Defendants' conduct violated clearly established law.

> ted the crime of possession of cocaine, either solely or jointly.

Id. at 372. While the facts of *Pringle* can also be distinguished from the instant case, Defendants faced a similar situation here: one of a small group of individuals had to be the assailant. Not only did each of the Plaintiffs answer to the general description provided by the civilian – (1) all were deputy sheriffs, (2) all had been involved in an investigation near Indiana Street and Union Pacific Avenue at around 1:30 a.m., and (3) all were Hispanic – but there were no other deputies matching the civilian's description in the vicinity at that time. True, an automobile is a more confined setting than an intersection, but the logical principle remains the same.

In light of *Rutherford* and *Pringle*, it cannot be said that the issue of whether probable cause exists in a situation like the instant one was clearly established at the time. This is not, after all, a case in which the victim provides a bare-bones description that matches an innumerable number of people. *See, e.g.*, *Grant*, 315 F.3d at 1088; *Commonwealth v. Jackson*, 459 Pa. 669, 331 A.2d 189 (1975). Nor is this a situation like *Brown* in which officers are suspected of wrongdoing solely because of their membership in a particular unit. Here, the civilian's description and the circumstantial evidence of the deputies' presence at the scene indicated that the entire universe of possible suspects consisted of Plaintiffs and Deputy Joe Carrillo. Given these unusual circumstances, the Court cannot say that a reasonable officer would have known that probable cause did not exist.

b. Plaintiffs' Fifth Amendment Privilege Against Self-Incrimination

Given the complexity of the application of the Fifth Amendment to the public employment context, and given the consistent line of authority holding that conduct such as Defendants' does not violate the Fifth Amendment, it cannot be said that Defendants' conduct in questioning Plaintiffs and in subsequently reassigning them violated a clearly established right. Indeed, Plaintiffs have not cited a single case in which a Fifth Amendment violation was found in similar circumstances. Accordingly, no reasonable officer could have known that Defendants conduct violated clearly established law.

c. Plaintiffs' Fourteenth Amendment Due Process Rights

Given the gross disparity between Defendants' conduct here and the conduct of the officers in *Cooper*, it can hardly be said that *Cooper* would have put a reasonable officer on notice that Defendants' conduct here clearly violated Plaintiffs' Fourteenth Amendment rights. Accordingly, even if Defendants had violated Plaintiffs' due process rights, they would be entitled to qualified immunity.

E. Conspiracy Claim

In order to prove a conspiracy under § 1983, the plaintiff must show an agreement or meeting of the minds between the alleged conspirators. *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002); *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1126 (9th Cir. 1989); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc). To prevail, the plaintiff need not show that each participant knew the exact details of the

conspiracy, but she must establish that each participant shared a common objective. *Franklin*, 312 F.3d at 441; *United Steelworkers*, 865 F.2d at 1541. Plaintiffs have failed to make any showing that Defendants shared a common objective.

In any event, a conspiracy claim under § 1983 is not actionable unless there has been an actual deprivation of the plaintiff's constitutional rights. *Woodrum*, 866 F.2d at 1126. Since Defendants did not deprive Plaintiffs of any of their constitutional rights, Plaintiffs' conspiracy allegation fails as a matter of law.

F. Monell *Claim*

A municipality may be held liable under § 1983 for an officer's unconstitutional conduct where the officer's conduct was pursuant to a municipal custom or policy, even one not formally approved by the municipality's decisionmaking body. *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978). A municipality may not be held liable under § 1983, however, where the officer's conduct did not actually violate the plaintiff's constitutional rights, even if the municipality has a custom or policy which authorizes or causes constitutional violations. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571 (1986) (per curiam); *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996).

Because Defendants did not violate Plaintiffs' constitutional rights, Plaintiffs' *Monell* claim fails as a matter of law.

V. CONCLUSION

Because Plaintiffs were not seized within the meaning of the Fourth Amendment, Defendants did not violate Plaintiffs' Fourth Amendment rights. Because Defendants did not compel Plaintiffs to waive their rights under the Fifth Amendment or attempt to use Plaintiffs' statements against them in a subsequent criminal case, Defendants did not violate Plaintiffs' Fifth Amendment rights. Finally, because Defendants' conduct did not shock the conscience or constitute coercive police conduct analogous to that at issue in *Cooper*, Defendants did not violate Plaintiffs' due process rights under the Fourteenth Amendment. Finally, because the law governing Defendants' conduct was not clearly established at the time, Defendants are entitled to qualified immunity even if their conduct did violate Plaintiffs' rights. Accordingly, Defendants' Motion for Summary Judgment [60] is hereby GRANTED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56617

(D.C. No. CV-03-06328-SVW
Central District of California, Los Angeles)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs-Appellants,
v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL.,
Defendants-Appellees.

[Filed Feb. 12, 2008]

ORDER

Before: KOZINSKI, Chief Judge, KLEINFELD, and TALLMAN, Circuit Judges.

Judges Kleinfeld and Tallman have voted to deny the petition for panel rehearing and the petition for rehearing en banc. Chief Judge Kozinski has voted to grant the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 03-06328 SVW(CWX)

(Honorable Stephen V. Wilson)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs,

v.

LEROY BACA, ET AL.,
Defendants.

[Filed Sept. 26, 2005]

JUDGMENT

WILSON, District Judge.

I. INTRODUCTION

On September 19, 2005, the Court, having entered an Order granting summary judgment in favor of Defendants Leroy Baca, William Stonich, Larry Waldie, William McSweeney, Neal Tyler, Thomas Angel, Arthur Ng, Allan Smith, Margaret Wagner, James Russell Kagy, Bryan Proctor, Los Angeles County Sheriff's Department, and County of Los Angeles (collectively "Defendants"),

IT IS HEREBY ORDERED that judgment be entered on all claims in favor of Defendants Leroy Baca, William Stonich, Larry Waldie, William McSweeney, Neal Tyler, Thomas Angel, Arthur Ng, Allan Smith, Margaret Wagner, James Russell Kagy, Bryan Proctor, Los Angeles County Sheriff's

Department, and County of Los Angeles and against Plaintiffs Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, Gustavo Carrillo, and Hector Ramirez (collectively "Plaintiffs"), and that Defendants recover their costs against Plaintiffs pursuant to a Bill of Costs to be filed by Defendants.

Dated: 9/23/05

/s/ STEPHEN V. WILSON
Honorable Stephen V. Wilson
United States District Court Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

May 7, 2008

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N. W.
Suite 400
Washington, DC 20036

Re: Elizabeth Aguilera, et al.
v. Leroy Baca, Individually and as Sheriff of
Los Angeles County, California, et al.
Application No. 07A872

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on May 7, 2008 extended the time to and including June 11, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ HEATHER TRANT

Heather Trant
Case Analyst

[attached notification list omitted]

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(4)

No. 07-1547

Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ELIZABETH AGUILERA, et al.,

Petitioners,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners have failed to demonstrate that the Court of Appeals' December 27, 2007 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Court of Appeals decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners have failed to even establish that the District Court erred in dismissing Petitioners' claims under the Fifth Amendment. Therefore, the Petition should be denied.

The threshold reason for denial of the Petition is that it seeks review of an issue that was never even raised below, in either the District Court or the Court of Appeals. As a result, neither the record nor the arguments on this issue were ever developed below, and should not be developed in the first instance in this Court.

Moreover, the Petition is based on a faulty premise, to wit, that the Petitioners were "punished" for exercising their Fifth Amendment rights. Both the District Court and the Court of Appeals specifically found that Respondents did not punish Petitioners. In fact, the subject job reassignments – temporary until Petitioners could be cleared of wrongdoing – were reasonable and consistent with sound, well-recognized employment practices.

Another reason for denial of the Petition is that the Opinion below does not conflict with this Court's precedent. Nor does it constitute a conflict with the few cases from other Circuits where they have discussed whether and what kind of notice may be necessary when employees refuse to provide compelled statements. Specifically, here, none of the Petitioners were compelled to give statements, and no statements were ever used against them in any criminal proceeding. Moreover, none of the Petitioners were terminated because they refused to provide statements. Thus, none of the cases cited by Petitioners are in conflict with the Panel's Opinion.

Finally, despite the rhetoric in the Petition, there exists no grand confusion amongst public entities or their employees about how to follow this Court's ruling 40 years ago in *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967). Over the years, this case has been applied by thousands of public entities without a significant body of cases expressing confusion or calling for clarification. Nor have groups responsible for pursuing police misconduct clamored for guidance from this Court on this issue. In fact, it appears that other than Petitioners, relatively few of the many stakeholders in this field are interested in Petitioners' new proposed constitutional rule which, if enacted, would cause more problems than it would supposedly cure.

In summary, Petitioners have failed to carry their substantial burden of demonstrating that there are

any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. The Assault Of A Member Of The Public Giving Rise To Petitioners' Suit.

The events at issue arise out of a narcotics investigation during the early morning hours of September 5, 2002. Supervisors at the Los Angeles County Sheriff's Department, East Los Angeles Station, learned that a member of the public was hospitalized with serious injuries to his head and back due to an assault with a baton or flashlight by a deputy sheriff. (1 ER 12, 79.)[1]

On September 5, 2002, at approximately 1:40 a.m., the victim, Martin Flores, had been a bystander at the scene of a narcotics investigation at a residence adjoining a bar. (1 ER 12, 4 ER 1077.) At the scene where the assault took place were six deputy sheriffs[2] and one field sergeant. (1 ER 11.)

During the course of the Sheriff Department's subsequent criminal investigation (discussed below),

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[1] "___ ER ___" citations are to the volume and page number of Petitioners' Excerpts of Record in the Court of Appeals.

[2] The personnel on scene were the Petitioners, Deputy Gustavo Carrillo (who was a plaintiff below but not a Petitioner in this Court), a sixth deputy (Joseph Carrillo) who never brought suit, and their field supervisor, Sean Burke. (1 ER 11.)

it learned that Mr. Flores had been in the street outside of the residence that was being searched for narcotics. (4 ER 1077.) He was intoxicated and had sporadically refused to comply with the deputies' instructions to leave the area. (*Id.*) Eventually, one or two deputies pushed Mr. Flores behind a large parked truck and, without justification, struck him three times with either a baton or a flashlight: the first blow was to the back right side of Mr. Flores' head; the second blow was to the right side of his torso; and the third blow was to the center of his back. (4 ER 1077-1081.)

Mr. Flores eventually escaped his attacker and made it to a nearby payphone, where he called 911. (4 ER 1078.) Los Angeles Fire Department paramedics were dispatched to the scene, where they located Mr. Flores and began treating his injuries. (4 ER 1078.) While the paramedics were assisting Mr. Flores, one or two deputies approached the paramedics and were informed that Mr. Flores was injured and that he had accused one of the deputies of being the assailant. (2 ER 386:12-387:4.) In response, the deputies told the paramedics that they should turn Mr. Flores over to them. (*Id.*) The paramedics refused this obviously improper request, and instead transported Mr. Flores to a local hospital emergency room. (*Id.*, 4 ER 1078.)

At the hospital, Mr. Flores was examined, given a CAT scan and other tests, and treated for his injuries. (4 ER 990, 1078.) A supervisor from the Los Angeles Police Department ("LAPD") responded to the hospital because the 911 call came from a payphone near

the patrol border of the LAPD and Sheriff's Department. (2 ER 442:17-27.) When the LAPD supervisor determined that the victim was certain that his attacker was a deputy sheriff (and not an LAPD officer), the LAPD supervisor called the watch commander at the East L.A. Sheriff's Station about the assault. (2 ER 442:17-27; 4 ER 1006-1007.) Despite the Department's policy requiring all deputies to immediately report any force used or witnessed to a superior, this was the first notice the Sheriff's Department had received that one or more of its personnel has used force against Mr. Flores. (1 ER 64; 2 ER 442:17-27.)

The Department promptly initiated an internal investigation into Mr. Flores' complaint of deputy misconduct, with the Station Watch Commander and Field Sergeant responding to the hospital to interview Mr. Flores and to confirm his physical injuries. (2 ER 442:17-27, 443:1-13.) Mr. Flores was unable to identify his exact attacker, but he was able to provide a detailed description: a deputy sheriff, Hispanic, male, who was of average build, which was consistent with Petitioners and the other deputies at the scene. (1 ER 55.) One of the deputies was female, but because of her physical appearance, she could have easily been mistaken for being male, especially at nighttime. (1 ER 56.)

Based on the verified information, including the information obtained from Mr. Flores and at the scene of the assault, all of the involved personnel were informed that at the end of their regular shift,

they should remain at the Station to be interviewed by Department investigators. (1 ER 80.) This instruction was consistent with Department members' affirmative duty to cooperate with such investigations. (1 ER 80, 2 ER 427.)

Accordingly, Petitioners and the other involved personnel waited at the Station to be interviewed. While waiting, everyone socialized, spoke with other members of the Department, were repeatedly asked if they needed anything, spoke on the telephone with their counsel, prepared reports, and slept, all the while receiving overtime pay from the Department. (1 ER 13, 80-81, 2 ER 448:1-450:4.)

What started as an administrative investigation (that could lead to employee discipline) quickly changed into a criminal investigation because it became clear that what had happened was an unlawful assault with a deadly weapon. Thus, later that morning, Sergeant James Kagy of the Department's Internal Criminal Investigations Bureau came to the Station to see if anyone would provide him with a voluntary statement. (1 ER 54-56.) After all of the Petitioners spoke on the telephone with their legal counsel (who was also general counsel for the deputies' union), all of the involved personnel were briefly interviewed. (1 ER 14.) Each interview was tape recorded and lasted only a few minutes. (2 ER 356-368.) During these interviews, Petitioners were advised that they were not suspects but could not be eliminated as suspects either. (1 ER 56.) When asked if they would like to make a statement, each deputy

invoked their right to remain silent, and the interviews were promptly concluded. (2 ER 356-368.) Thus, no compelled statements were taken at this time from any of the Petitioners.

Because none of the Petitioners could be cleared of wrongdoing concerning the assault of Mr. Flores, they were removed from field assignments that allowed them to use unsupervised force against members of the public, which means that each was reassigned from patrol to Station duties pending the ongoing investigation. (1 ER 64-65; 2 ER 453:5-20.) Until each deputy could be cleared of wrongdoing, each was temporarily assigned to the Station, where they performed various duties of a law enforcement officer, such as taking 911 emergency calls, responding to requests for assistance by persons who came to the Station, and supervising inmates held at the Station jail. (1 ER 82.)

The deputies initially claimed that the temporary reassignments caused them hardships. (1 ER 82.) In response, the Station captain asked each deputy to provide him with a written memorandum setting forth the specific circumstances of his or her hardship and how it related to the reassignments, but the deputies never responded to his request. (1 ER 82; Petitioners' Appendix [hereinafter "App."] 6a.)

In the meantime, Sgt. Kagy continued his investigation. Over the following months, he interviewed various Department employees about their involvement in the incident, repeatedly interviewed various

citizen witnesses who were present at the narcotics investigation (and, therefore, could have witnessed some or all of the crime), gathered and analyzed substantial physical evidence (e.g., medical records, tapes and transcripts of radio transmissions, Department files, photographs, records of mobile digital transmissions from the subject patrol vehicles, tapes of telephone calls made to the Station), coordinated with state and federal prosecuting agencies, and responded to inquiries made by the Petitioners' legal representatives. (1 ER 57-58.)[3]

While Sgt. Kagy was investigating this matter, he was also very busy simultaneously tending to other important criminal investigations, including two major sexual assault investigations and an assault with a deadly weapons investigation. (1 ER 58.)

During the investigation, Petitioners were continuously represented by legal counsel, were allowed to keep their law enforcement powers, were allowed to work as peace officers at the Station, and received

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[3] Petitioners asserted below that the few police reports they submitted on summary judgment showed that the Department knew long before Petitioners were reinstated that they would be cleared of wrongdoing. Petitioners' assertion was false and their argument was without merit for several reasons. For example, the District Court found that Petitioners had failed to make a proper evidentiary showing. (App. 38a-39a.) The Court of Appeals affirmed this ruling. (App. 23a.) Also, there was no foundation for Petitioners' assertion because they never submitted the entire investigation, only selected excerpts.

their usual compensation, including occasional overtime pay. (1 ER 13, 4 ER 950-963.)

In August, Sgt. Kagy completed, assembled, and submitted his investigation to prosecutors for their review and evaluation. (1 ER 58.)

In September, based on their review of the investigation, the District Attorney and United States Attorney's offices determined that the deputy who committed the felony assault against Mr. Flores was Petitioner Bardon. (1 ER 59.) Therefore, in October, they had Sgt. Kagy take compelled statements from the other deputies – Petitioners Aguilera, Arellano, and Ramirez and Deputy Carrillo – *none of whom were ever asked to and therefore ever waived their right against having such statements used against them in a later criminal proceeding*. (1 ER 59; App. 7a.) Based on the information obtained from these statements, the Petitioners and Deputy Carrillo were cleared of the investigation, and as a result they were restored to their pre-investigation assignments. (App. 7a.)

Ultimately, the prosecutors determined that based on the statements of Mr. Flores, which were corroborated by his significant physical injuries, "a crime occurred" and that "there is a strong likelihood that" Petitioner Bardon was the assailant, but they concluded "that there [was] insufficient evidence to prove beyond a reasonable doubt that Deputy Bardon committed an assault under color of authority upon Martin Flores." (4 ER 1081.) Accordingly, prosecutors

declined to file charges against Deputy Bardon. (*Id.*) As a result, Petitioner Bardon's prior job assignment was restored as well. (4 ER 453:16-20.)[4]

Thus, no criminal case was ever filed against Petitioners, nor were any compelled statements ever used against any of the Petitioners in any criminal proceeding.

II. The Proceedings In The District Court And The Court Of Appeals.

Petitioners filed suit on September 5, 2003. (1 ER 1.) Their Complaint, which was never amended, sets forth their Fifth Amendment claim in Count Three. (1 ER 20-22.) Petitioners alleged that their rights had been violated because Respondents had purportedly retaliated against them for exercising their right to remain silent. (*Id.*) Respondents denied Petitioners' allegations. (1 ER 32-40.) Nowhere did Petitioners allege that Respondents were required by the Fifth Amendment to provide them with notice that any compelled statement could not be used against them in a criminal proceeding and that if they refused to provide such a statement they could be subject to administrative discipline. (1 ER 20-22.)

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[4] Petitioner Bardon left the employ of the Sheriff's Department during the pendency of this litigation.

Based on the pleadings, the parties conducted discovery and, eventually, Respondents sought summary judgment. (1 ER 41.) Not surprisingly, the summary judgment papers were limited to the issues raised by the pleadings, and did not include the issue about which Petitioners now seek review. (1 ER 41-43.) After consideration of the admissible evidence and applicable law, the District Court granted Respondents' motion and dismissed Petitioners' Fifth Amendment claim on multiple grounds. (App. 62a-69a.) The District Court specifically held that, "Indeed, Plaintiffs have not cited a single case in which a Fifth Amendment violation was found in similar circumstances." (App. 83a.) Nowhere did the District Court address the issue Petitioners now seek to raise because it was never presented below. (*Id.*)

Petitioners then sought review by the Court of Appeals. In accordance with the Federal Rules of Appellate Procedure, Petitioners phrased the issue they wanted reviewed concerning the Fifth Amendment as follows: "That Plaintiffs were not unlawfully punished for exercising their rights to remain silent, as guaranteed by the 5th Amendment to the United States Constitution, by being reassigned to undesirable and inferior work assignments and positions for an unnecessarily and intentionally prolonged period of time." (Petitioners' Opening Brief, 3.)

Nowhere in their Opening Brief or in their Reply Brief did they raise the issue now posed to this Court. The Court of Appeals thereafter affirmed the judgment of the District Court on multiple grounds.

Petitioners thereafter filed their Petition, limiting their request for review as stated above, and abandoning all other issues. (Petition ["Pet."], 9.)

REASONS FOR DENYING THE PETITION

I. The Petition Seeks Review Of An Issue Not Raised In This Action.

There are many reasons why this Court should deny Petitioners' request for review, but the first is that it seeks review of an issue that, before now, was neither raised by the Petitioners nor litigated by the parties below.

Specifically, nowhere in Petitioners' operative Complaint did they raise the issue for which they seek review: whether the Respondents were required by the Fifth Amendment to provide them with notice that any compelled statement could not be used against them in a criminal proceeding and that if they refused to provide such a statement they could be subject to administrative discipline. Because the issue was not raised by Petitioners' pleading, it was never the subject of discovery by the parties.

For example, nowhere did the parties fully develop a record about what notice was or was not provided the Petitioners (or their legal counsel, with whom Respondents communicated), including whether they were given the notice that they now contend is constitutionally required. Petitioners pursued their

claims in the District Court for more than two years, but the parties never addressed this issue, nor obviously related issues such as if notice was provided, to whom? When? What was the substance of the notice? What was the response? Also, if no notice was provided, why? If not, did any harm result?

The foregoing explains why, in the Court of Appeals, Petitioners never raised (properly or otherwise) the issue of what notice, if any, is constitutionally required. Nowhere was the issue raised as an issue in their Opening Brief to the Court of Appeals, as required by the applicable appellate rules. *See, e.g.*, Fed. R. App. Proc., Rule 28(a)(5)-(9) (requiring an appellant's opening brief to contain a statement of the appellate issues); *Reed-Goss v. Astrue*, 2008 U.S. App. LEXIS 18205 at *4 (9th Cir. 2008) ("[the plaintiff's] claim that [the administrative law judge] failed to discuss her alleged inability to perform work on a sustained basis was not raised in the district court and is therefore waived"); *Ritchie v. United States*, 451 F.3d 1019, 1026 n. 12 (9th Cir. 2006) (argument waived because it was not raised in district court); *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 1998) (waiver where appellant failed to raise issue either in the district court or in opening brief, but instead raised issue for first time at oral argument); *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 923 (9th Cir. 1988) (citing Fed. R. App. Proc., Rule 28). Also, nowhere was the issue discussed in the body of Petitioners' Opening Brief or in their Reply Brief.

Instead, the issue about which Petitioners now seek review was raised for the very first time by the judge who dissented from the Panel's ruling (App. 30a), which was only briefly responded to by the majority in a footnote. (App. 19a-20a.) This is certainly not the manner in which purportedly important issues of law can or should be brought to this Court for adjudication. The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure set forth how litigants can and must raise issues and claims for resolution by the federal courts, and failure to do so deems the matter waived. The long-standing case law of this Court is in accord. *See, e.g., Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169, 125 S.Ct. 577, 585 (2004) ("We ordinarily do not decide in the first instance issues not decided below."); *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 109, 122 S.Ct. 511 (2001) *(per curiam)*; *United States v. Mendenhall,* 446 U.S. 544, 551-552, n. 5, 100 S.Ct. 1870 (1980); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S.Ct. 1952, 1956 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals. . . . 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1602, n. 2 (1970)); *Dothard v. Rawlinson,* 433 U.S. 321, 323, n. 1, 97 S.Ct. 2720, 2724, n. 1 (1977) (holding that a constitutional issue is not properly before this Court where the issue had not been raised

in the district court); *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, ___ U.S. ___, 127 S.Ct. 1199, 1207 (2007) ("In any event, we ordinarily do not consider claims that were neither raised nor addressed below . . . and PG & E has failed to identify any circumstances that would warrant an exception to that rule in this case. We therefore will not consider these arguments.").

Here, Petitioners have not properly presented – below or to this Court – the issue about which they now seek review. The record, factually or legally, was never developed in the District Court. When seeking review by this Court, Petitioners have the important affirmative duty to show that they have satisfied all of the procedural and substantive prerequisites necessary for review. Here, Petitioners have not met this fundamental burden.

II. This Court Declined To Review This Issue Last Term.

Last term, this Court declined to review a First Circuit decision in which no Fifth Amendment violation was found where the plaintiff was charged with failure to cooperate after he and his attorneys were advised that he did not face criminal prosecution, and yet the plaintiff did not answer questions during an administrative investigation. *Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1924 (2008). The dissenting opinion in *Sher* called for the adoption of a

rule that a government employer is required to advise an employee of his rights and obligations before he can be disciplined for maintaining his silence – as did the dissenting opinion below. *Id.* at 509-513.

No significant legal developments have occurred since this Court denied the Petition for a Writ of *Certiorari* in *Sher*. Accordingly, this Petition should be denied for this reason alone.

III. The Petitioners Were Not Punished For Exercising Their Fifth Amendment Rights.

Another reason to deny the Petition is that it is based on a faulty premise: that Petitioners were punished for exercising their Fifth Amendment rights. Petitioners' assertion was properly rejected by both the District Court and the Court of Appeals.

First, the undisputed evidence was that Petitioners and the other employees were temporarily reassigned until they could be cleared of wrongdoing, regardless of whether they gave the Department a statement or not. (1 ER 64:1-8, 65:14-25.) Also, the intent was never to punish any of the involved employees, but to protect the public, the deputies, and the Department. (1 ER 82:22-28.)

Second, Petitioners never proved with admissible evidence their unsubstantiated claims of "punishment." For example, with respect to the Station

captain who Petitioner Aguilera believed (without any foundation whatsoever)[5] had wrongfully denied her promotions because of the investigation, he offered undisputed testimony that he did not even know of any promotional opportunities for her, much less curtail them. (4 ER 896:2-21.) Also, in response to Petitioner Aguilera's vague claim that she was denied overtime, she was presented with (and never responded to) her own payroll records reflecting her receipt of overtime during the investigation. (4 ER 950-963.)

That is why, after fully reviewing the extensive record, the Court of Appeals agreed "with the district court's observation that the supervisors' actions in this case 'w[ere] [not] done to punish [the deputies] for asserting their constitutional rights.'" (App. 21a.)

Petitioners failed to submit to the District Court admissible evidence to support their false assertion that their temporary job reassignments were in retaliation for their exercising their Fifth Amendment rights. To the contrary, the undisputed admissible evidence was that the Station supervisors who made the decision to temporarily reassign Petitioners: 1) were different than and outside the chain of command of the ICIB supervisors who controlled the

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[5] In support of their assertion, Petitioners cite their pleading (which is irrelevant for summary judgment purposes) and a declaration containing assertions with no specifics or foundation. (Pet. 5 n. 3.)

criminal investigation (1 ER 59:15-20, 64-66, 71:14-20, 81-82); 2) they did not order the reassignment with the intent to punish Petitioners or to compel any unimmunized statements (3 ER 893:7-10); 3) they did not believe that the temporary reassignments would cause the Petitioners to provide unimmunized statements; 4) they believed it would be wrong to obtain statements from Petitioners in violation of the deputies' Fifth Amendment rights (2 ER 396:1-397:21); and 5) they implemented the temporary reassignments – even though it imposed a burden on the Department – because they believed that it was in the best interests of the public, the deputies, and the Department. (3 ER 892:8-893:6; 1 ER 64:1-66:2, 81:22-82:21.)

The prudence and constitutionality of Petitioners' temporary reassignments are illustrated by the analogous facts and instructive analysis in *Dwan v. City of Boston*, 329 F.3d 275 (1st Cir. 2003). In *Dwan*, an African-American undercover police officer was beaten by other police officers during a foot pursuit of robbery suspects. The plaintiff police officer initially prepared a written statement regarding his conduct during the incident, and as the investigation continued, he was called before a federal grand jury on two occasions. The plaintiff was *not* granted immunity, and he invoked his right against self-incrimination. *Id.* at 277. The plaintiff was subsequently placed on administrative leave for 18 months for the "'efficiency of the department,'" during which time he received his regular salary but could not work overtime or

special assignments. *Id.* After the plaintiff was reinstated upon passing the second of two polygraph examinations, the plaintiff sued, claiming in part that the defendants' actions violated his Fifth Amendment rights. *Id.* at 278. The district court denied defendants summary judgment as to this claim, and on appeal, the First Circuit reversed.

For purposes of the appeal, it was assumed that "the administrative leave decision was prompted at least in part by [the plaintiff]'s action in taking the Fifth Amendment and not solely by an unrelated determination that he should be investigated internally for misconduct." *Id.* at 279. Nevertheless, the First Circuit explained that administrative actions taken after the invocation of the Fifth Amendment are not necessarily impermissible and reached a finding that is highly relevant here:

> Given the objective circumstances of this case, we see nothing unreasonable about the actions taken by the defendants. It is beyond dispute in this case that unidentified policemen on the scene badly beat a black undercover police officer, mistakenly believing him to have shot another policeman, and it is almost certain that *some* of the other officers present knew who had done it, denied having knowledge, and supported each other's stories. . . . [¶] [The plaintiff] may or may not have had such knowledge. But what the defendants knew was that he had told a story

> as to why he did not see what happened. . . . and [the plaintiff] then declined to testify about the matter before a grand jury without immunity. On this basis, the defendants were perfectly entitled to begin an investigation into whether [the plaintiff]'s original claims constituted false reporting and other violations of departmental regulations. [¶] *Nor was there anything unreasonable in placing him on administrative leave with pay pending this investigation even though this meant he was not eligible for extra duty which would have meant more pay. Administrative leave, for one reasonably suspected of serious misconduct, is a routine measure – here mitigated by continued pay. That [the plaintiff] suffered some disadvantage . . . does not make it a constitutional violation.*

Id. at 280 (latter emphasis added). Moreover, the First Circuit held that even if the defendants had hoped that the plaintiff would waive his right against self-incrimination, that hope did not render the placement of the plaintiff on administrative leave unconstitutional. *Id.* at 281.

Just as the plaintiff in *Dwan* was not "punished" within the meaning of the Fifth Amendment, when he was placed on administrative leave for 18 months pending the outcome of the internal investigation, Petitioners were not punished when they were temporarily assigned to Station duty. The same legitimate

concerns that justified the challenged action in *Dwan* also justified the challenged action here.[6]

Thus, since Petitioners were never punished for exercising their Fifth Amendment rights, this case does not fall within the issue about which Petitioners seek review. Accordingly, the Petition should be denied.

IV. The Decision Below Is Consistent With This Court's Jurisprudence And Does Not Create An Inter-Circuit Conflict That Warrants Review.

A. The Court Of Appeals Correctly Held That Petitioners' Fifth Amendment Rights Were Not Violated.

In a trilogy of cases published over 40 years ago, this Court established that public employees are entitled to the Fifth Amendment's right against self-incrimination and that public employees cannot be discharged for having refused to waive this right. *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967); *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 (1968); *Uniformed Sanitation Men*

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[6] The First Circuit also struck down the contention that denial of overtime pay can constitute actionable punishment by eliciting the example of a state-employed cashier who refuses to discuss money missing from the treasury: "surely it would not be a civil rights violation to put the cashier on administrative leave pending investigation merely because the cashier would forego overtime pay." *Id.* at 280.

Association, Inc. v. Commissioner of the City of New York, 392 U.S. 280, 88 S.Ct. 1917 (1968). At the same time, this Court balanced these interests against the public employer's interest in investigating wrongful conduct by clarifying that if an employee refuses to "answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity*, with respect to the use of his answers or fruits thereof in a criminal prosecution of himself," the right against self-incrimination would not bar the employee's dismissal. *Gardner*, 392 U.S. at 278 (emphasis added); *see also*, *Uniformed Sanitation Men*, 392 U.S. at 284.

Over the last four decades, these holdings have been consistently applied to mean that a public employee may be required to provide a statement regarding his job performance as long as that statement is not used against him in a criminal proceeding. The dynamics of this employment equation – the "compelling" of a statement – has surely lost whatever novelty that it may have once had, and public employees (especially in the law enforcement setting) have long since become familiar with its application. Simply put, employers and employees alike are well aware that when a statement is "compelled," that statement is off limits for purposes of criminal prosecution.

These well-established principles could not have been violated in the instant case simply because they were not triggered until three of the four Petitioners

provided compelled statements in October 2004. Indeed, it was undisputed that when Petitioners were initially questioned in September 2003 about their actions, no effort was made to obtain a "compelled" statement from them and that they were permitted to exercise their right against self-incrimination. (2 ER 356-368.) As the Court of Appeals held, "the supervisors did not violate the deputies' Fifth Amendment rights when they were questioned about possible misconduct, *given that they were not compelled to answer the investigator's* questions, or *to waive their immunity from self-incrimination.*" (App. 21a; emphasis added.)

Thus, Petitioners were never placed in the position of having to relinquish their Fifth Amendment rights to save their jobs (unlike the employees in *Gardner* and *Uniformed Sanitation Men*), and consequently, the Court of Appeals correctly further held that Petitioners' "Fifth Amendment right against self-incrimination was not implicated by the supervisors' conduct." (App. 19a (citing *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) ("[t]he Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers"); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995) (no Fifth Amendment violation where the officers were not asked to waive their privilege against self-incrimination and were asked job-related questions)).

The soundness of the Court of Appeals' reasoning and holding is evidenced by the fact that Petitioners do not challenge its finding that the absence of a compelled statement, along with the absence of the waiver of the *Garrity* immunity, raises no Fifth Amendment concerns. Instead, Petitioners seek review of an issue that was not properly raised below (as discussed *supra*) – that the Court of Appeals' narrow holding somehow creates or exacerbates an allegedly dramatic inter-circuit conflict regarding whether an employee must be advised of the employment consequences of refusing to provide an *immunized* (i.e., compelled) statement.

Petitioners' attempt to seek review to address this purportedly important issue should be denied. The Court of Appeals' holding (based on circumstances that *did not* involve any attempt to compel an immunized statement) does not create any conflict with the few cases since *Garrity* that have addressed whether the taking of a compelled statement imposes a duty to advise the employee of the possible administrative consequences of refusing to provide a statement.

B. The Court Of Appeals' Proper Application Of Controlling Precedent And Its Narrowly-Crafted Holding Did Not Create Or Broaden Any Material Inter-Circuit Conflict.

Petitioners glean from the holdings and dicta of a mere handful of cases a purported Fifth

Amendment requirement on which they seek to impart constitutional significance of the highest order. Without this requirement – that a government employer seeking a compelled (and therefore immunized) statement from an employee must first warn him or her that because of the attached immunity, the employee must cooperate or face administrative discipline – Petitioners contend that prosecutorial and administrative anarchy will ensue, with a heightened and disproportionate impact on the ability of law enforcement agencies to protect the public trust, to safeguard the integrity of criminal prosecutions, and to weed out rogue officers.[7] (*See* Pet. 30-33.)

Petitioners' overarching contention that the decision below somehow exacerbates an irreconcilable and "deeply entrenched" conflict regarding their proposed "*Garrity* notice" rule is undone by the fact that this rule could and would only come into play when a public employer is intent on *compelling* an employee to provide an immunized statement. As Petitioners state, there are questions about how to "protect employees' Fifth Amendment rights sufficiently to permit a public employer *to compel testimony* (or punish employees who refuse to testify)." (Pet. 7.) Simply put, the new rule Petitioners seek would only be triggered when a public employee is

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[7] As explained in Section V, *infra*, Petitioners do not present any concrete evidence of these dire consequences – consequences that seemingly should be arising everyday in each Circuit that has not adopted Petitioners' proposed "*Garrity* notice" rule.

asked to provide a compelled and immunized statement – conversely, when *no such request is made*, as in the instant case, this proposed rule would have no relevance. Accordingly, the Court of Appeals' holding – which was based on circumstances devoid of the compulsion of any statement under *Garrity* – cannot be treated as having created any meaningful conflict with the cases upon which Petitioners rely.

Indeed, Petitioners discuss cases that, without exception, involve situations where public employers sought immunized statements from their employees, and it was in this context that these courts examined the question of whether the employer should be required to advise employees of the adverse employment consequences of their refusal to provide the immunized statement. For example, in *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001), the plaintiff challenged the Merit Systems Protection Board's decision to affirm the Department of Veteran Affairs' decision to remove him from federal service. *Id.* at 1346. The plaintiff had been employed as a realty specialist and was investigated for possible criminal activity and questionable realty transactions. When the plaintiff appeared before the Board with his union representative, he refused to answer any questions, invoking the Fifth Amendment. *Id.* at 1347.

Subsequently, the plaintiff was notified in writing that the U.S. Attorney had *granted him immunity*, that he would not be prosecuted, and that he

was therefore required to respond to the investigator's questions. *Id.* at 1347. The plaintiff then indicated that he would not respond until he was able to consult with an attorney. *Id.* at 1348. The investigator responded by sending the plaintiff a letter proposing that he would be removed from his position, based on charges related to the realty transactions and refusal to cooperate during the investigative proceeding. The proposed actions were subsequently taken, and the plaintiff appealed. *Id.*

In addressing the propriety of the refusal to cooperate charges, the Federal Circuit addressed the plaintiff's contention that "he had a legitimate basis for refusing to answer the questions until he had time to meet with his attorney" because "he was unclear about the scope of any immunity" that had been provided to him. *Id.* at 1350. It was in this particular context that the Federal Circuit summarized the holdings of *Garrity* and *Gardner* and stated that the "[i]nvocation of the *Garrity* rule for *compelling answers* to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is *duly advised of his options to answer* under any immunity actually granted or remain silent and face dismissal." *Id.* at 1351 (emphasis added) (citing *Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983)). The Federal Circuit held that the plaintiff had not been afforded a meaningful opportunity to be advised of his options because his request to meet with his attorney had not been accommodated. The Board's

decision to sustain the charges regarding the plaintiff's refusal to cooperate with the investigation was therefore reversed. *Id.* at 1353.[8]

Thus, Petitioners' suggestion that the Federal Circuit has established a rule in direct conflict with the holding below is false; the Federal Circuit's analysis is strictly limited to cases where an employee has been assured that his answers will not be used against him in a criminal proceeding, i.e., that his statement will be immunized. This, however, was not the case below because "when [Petitioners] were questioned about possible misconduct, . . . [they] were *not compelled to answer* [Sergeant Kagy]'s questions. . . ." (App. 18a.) In the absence of this key element of the *Garrity*-based Fifth Amendment construct, the Court of Appeals could not and did not reach a holding that conflicts with the Federal

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[8] The Federal Circuit also distinguished this case from *Weston* – where there also had been no ambiguity as to the declination to prosecute and where the employee had access to counsel. *Id.* In *Weston*, the plaintiff was advised that "the United States attorney has declined criminal prosecution of you . . . This is purely and administrative inquiry . . . your failure to answer relevant and material questions, as they relate to your official duties, may cause you to be subjected to disciplinary action. . . ." 724 F.3d 946. The *Weston* Court explained that this notice adequately invoked the *Garrity* rule for "*compelling* answers", and that an employee could not refuse to answer pertinent questions after having been "assured of protection against use of his answers or their fruits in any criminal prosecution. . . . " *Id.* at 948.

Circuit, or the few other cases upon which Petitioners rely.

Petitioners also point to the Seventh Circuit as a basis for their proposed expansion of the *Garrity* rule, and the most noteworthy case is *Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002). In *Atwell*, the plaintiff was investigated for financial improprieties and was advised by her counsel to not meet with her employer's investigator. *Id.* at 989. The plaintiff was subsequently *terminated* for insubordination in failing to cooperate in the investigation. *Id.* The Seventh Circuit explained that it had a "*unique*" rule requiring a public employer "who wants to ask an employee potentially incriminating questions [to] first *warn* him that because of the immunity to which the cases entitle him," that "he may not refuse to answer the questions on the ground that the answers may incriminate him." *Id.* at 990. Nevertheless, the Seventh Circuit held that this rule had not been violated because the plaintiff did not come to the meting at which she would have been warned "that if she refused to answer the question[s] . . . the Fifth Amendment would not protect her from being fired for refusing to cooperate in the investigation." *Id.* at 991.

Not surprisingly, Petitioners fail to acknowledge the Seventh Circuit's characterization of its rule as "unique" – a description that, at the very least, illustrates the exaggerated nature of Petitioners'

contention regarding the magnitude to which their proposed rule has been adopted.[9]

Finally, Petitioners rely on dicta from the opinion on remand in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 426 F.2d 619 (2d Cir. 1970). In *Sanitation Men*, 15 city sanitation employees were originally terminated for having refused to sign waivers of their Fifth Amendment immunity and refusing to testify before a grand jury. This Court reversed, and on remand, the plaintiffs were reinstated, and were called to appear at a departmental inquiry. *Id.* at 621. The plaintiffs were advised of their right against self-incrimination; that their statements could not be used against them in a criminal proceeding; and that if they did not answer material and relevant questions, they could be subject to disciplinary action. *Id.* After the plaintiffs invoked their right against self-incrimination and declined to answer questions, they were *terminated* – an action that the Seventh Circuit held to be constitutionally valid under *Garrity*. *Id.* at 622, 627. Thus, *Uniformed Sanitation Men*, on remand, is also categorically distinguishable from the instant case

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[9] The Seventh Circuit also questioned whether this rule should have any "possible application when the employee has a lawyer. . . ." *Id.* at 991. This comment has significance in the instant case since Petitioners conferred with their counsel immediately prior to being interviewed by Sgt. Kagy, as well as had legal representation throughout the investigation, and they therefore had ample opportunity to be advised of their constitutional rights. (1 ER 14:1-5; 2 ER 448:11-18.)

where Petitioners were not asked to provide immunized and compelled statements, and were not subject to anything close to the kind of job action imposed against the plaintiffs in *Uniformed Sanitation Men*, *Atwell*, and *Modrowski*.

The few cases upon which Petitioners place so much weight, and the decision below, therefore, do not represent opposite sides of any significant constitutional rift that requires this Court's attention. The Court of Appeals' holding was grounded on a factual scenario fundamentally different from those factual scenarios in these other cases.[10] Because Petitioners were not compelled to provide immunized statements during the relevant time period, the question of whether they should have been warned about the consequences of not providing immunized statements was not and could not have been litigated below. Concomitantly, Petitioners did not face termination or similar disciplinary action for declining to provide voluntary statements to Sgt. Kagy. These key factual distinctions clearly demonstrate the invalidity of Petitioners' contention that the decision below creates an irreconcilable conflict with the few cases where aspects of their proposed notice rule were addressed. Therefore, because the decision below neither creates nor broadens any inter-circuit conflict, this Petition should be denied.

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[10] The same is true for the few state court cases cited by Petitioners.

V. Petitioners' Contention That There Is Rampant Confusion About Applying *Garrity* Is Patently Untrue And Contradicted By Four Decades Of Case Law.

If the Petition and the Amici briefs are to be believed, then with respect to *Garrity*, the proverbial sky is falling. Common sense and four decades of experience prove otherwise.

A. Petitioners Have Made Absolutely No Showing That Law Enforcement Officers Who Have Engaged In Criminal Activity Are Escaping Prosecution Because Of Any Purported Confusion Caused By *Garrity*.

Petitioners assert that review by this Court is necessary or police misconduct investigations will be jeopardized by investigators mistakenly taking compelled statements from officers who otherwise would have been prosecuted. (Pet. 31.) Notably absent from the Petition and the two Amicus briefs is a citation to even one case where such a scenario occurred. Petitioners' failure to cite to even one case – much less a litany – is proof that there is no problem that requires this Court's intervention.

Petitioners also broadly contend that their proposed *Garrity* notice rule is needed so that "investigators do not inadvertently interfere with prosecutorial interests" by erroneously taking immunized statements. (Pet. 31.) It is unclear exactly (or even

generally) how adopting their proposed rule would prevent investigators from inadvertently compelling statements from criminal suspects. Indeed, their proposed rule would only come into play *after* the decision to compel an immunized statement has been made since the advisement of rights required by their proposed rule would have no relevance when the employer had no intention of compelling a statement from an employee.

B. Review Is Not Needed To Cure Any Purported Confusion About *Garrity*, As Evidenced By 40 Years Of Case Law And The Lack Of Amicus Support By Agencies Who Prosecute Law Enforcement Officers.

If there truly existed any confusion over *Garrity*, then Petitioners would have cited many cases from every Circuit that would have been authored during the last 40 years. They have not, because they cannot, and instead rely upon a few cases that, when examined closely, have nothing to do with the facts presented in this case.

Another telltale sign that Petitioners' assertion that there exists some kind of widespread confusion about how to apply *Garrity* is without merit is who are *not* seeking review by this Court. If Petitioners' assertion were true, then legions of law enforcement agencies, inspectors general, and other police misconduct watchdog groups would be advocating review,

asking for guidance about how to apply *Garrity*. But they are not.

Indeed, the reason entities and organizations that investigate and prosecute police misconduct have not joined in Petitioners' request for review and that many lower court opinions have not suggested review of the issue now presented by Petitioners is that, contrary to the assertions by Petitioners and Amici, there is no confusion (widespread or otherwise) about *Garrity*. Therefore, further guidance by this Court is not necessary.

C. There Is No Compelling Need For This Court To Write Into The Constitution A New Rule, Especially One That Could Have Dire Consequences.

The truth is, Petitioners and the few labor unions (and their general counsel) who submitted both Amicus briefs want review by this Court so that they may obtain something unprecedented: an opinion by this Court that writes into the United States Constitution an affirmative duty by a public employer to give employees suspected of wrongdoing immunity from criminal prosecution before their job conditions can be altered pending the investigation. No such duty by the employer or right of the employee is supported (much less compelled) by this Court's precedent, the Opinion in this matter, or the law of other Circuits.

In fact, in addition to being without precedent, any such rule would defy common sense and could actually lead to absurd, even tragic results. For example, assume that a law enforcement agency that provides police services to a preschool receives credible information that one of the six law enforcement personnel assigned to the school has molested one of the children. All of the employees were present when the crime occurred, had the opportunity to commit the crime, and fit the description given by the child victim. Obviously, the law enforcement agency would (and should) temporarily remove the suspected employees from the preschool while they investigated the crime and cleared each employee of wrongdoing.

However, under the new constitutional rule proposed by Petitioners, each employee would have a constitutional right to continue working at the preschool (where additional children could be victimized) unless and until the employing law enforcement agency granted them immunity from criminal prosecution and took their compelled statements. That is not, nor should it be, the law.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ELIZABETH AGUILERA, PHILLIP ARELLANO, BENJAMIN BARDON, AND HECTOR RAMIREZ,
Petitioners,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents' efforts to sow confusion with their brief in opposition cannot obscure the existence of a deep and entrenched conflict on the proper application of this Court's decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967), *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). This case presents the Court with an ideal vehicle to resolve that conflict on an issue implicated in thousands of internal investigations every year and to clarify the protections accorded to public employees under the Fifth Amendment.

I. THE ISSUE PRESENTED IN THE PETITION WAS PROPERLY PRESERVED AND ADDRESSED BY THE COURTS BELOW

Respondents attempt to distract this Court from considering the critically important issue identified in the petition by raising issues that have nothing to do with the Question Presented in this case. Petitioners do not challenge the need to administer a law enforcement agency in a fair and even-handed fashion that both protects public safety and respects employees' constitutional rights, let alone argue that suspected child molesters must be given access to potential victims unless granted immunity (*cf.* Opp. 35). This case simply does not concern routine prophylactic procedures to protect the public during the course of an investigation. *See also infra* pp. 6–9.

Nor do petitioners challenge an agency's ability to seek truly voluntary statements from its employees without *Garrity* warnings—so long as the agency does not thereafter punish those employees who assert their Fifth Amendment rights and decline to testify.

The issue here is whether petitioners were unconstitutionally punished for exercising their Fifth Amendment rights. Petitioners raised that issue at every stage of the litigation, and both courts below resolved it.

In count two of their initial Complaint, petitioners alleged (at ¶ 99) that respondents had "retaliated and discriminated against [petitioners] by changing their work shifts and duty assignments as punishment for their exercise of their [Fifth] Amendment right to remain silent." 1 E.R. 20.

In their Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, petitioners included (at 15–17) a full argument under the heading "Defendants May Not Discipline Plaintiffs for Refusing to Waive Their [Fifth] Amendment Rights." This argument not only raised the precise issue in the Question Presented, but also cited this Court's relevant cases, including *Garrity*, *Gardner*, and *Uniformed Sanitation Men*.

On appeal, petitioners' "issue presented" in their Opening Brief to the Ninth Circuit (at 2) was

> whether a governmental police employer is Constitutionally prohibited from retaliating against and punishing its police officer employees, who have been named by that employer as suspects in a criminal investigation, by reassigning the employees to less desirable work schedules and assignments, and thereafter extending those reassignments unnecessarily, as punishment for the employees' proper exercise of their [Fifth] Amendment rights to remain silent.

2006 WL 2982007, at *2. In the body of the brief (at 26), petitioners reiterated the argument that "their Fifth Amendment rights were violated by defendants'

intentional retaliation and imposition of a penalty for asserting their Fifth Amendment rights," again citing *Garrity*, *Gardner*, and *Uniformed Sanitation Men*. *Id.* at *26; *see also* Appellants' Reply Br. 12–16.

Not only did petitioners present this issue to both courts below, but both courts addressed the issue at length in their opinions. The district court, discussing this Court's decisions in *Garrity*, *Gardner*, and *Uniformed Sanitation Men*, devoted more than seven pages to petitioners' claim that the punishment inflicted upon them for asserting their Fifth Amendment rights was unconstitutional. *See* App. 62a–69a. The majority opinion below addressed and rejected petitioners' Fifth Amendment claim, *see* App. 16a–22a, while Chief Judge Kozinski's dissent both disagreed with the majority's resolution, *see* App. 27a–34a, and recognized the circuit split that militates in favor of granting this petition, *see* App. 30a ("The majority . . . adopts the harsh and unfair rule of the Fifth and Eighth Circuits . . . . The Second, Seventh and Federal Circuits have the better approach.").

Thus, the Question Presented in the petition was consistently raised below, argued in the relevant briefs with reference to this Court's applicable decisions, and carefully addressed by both courts below. It is appropriately presented for this Court's review.[1]

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[1] Even if petitioners had not clearly argued the Question Presented to the courts below, "the general rule that issues must be raised in lower courts . . . does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA*, 529 U.S. 460, 469 (2000). *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("In fact, even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.").

II. THE CONFLICT ON THE CORRECT APPLICATION OF *GARRITY* AND ITS PROGENY IS DEEP AND ENDURING, AND HAS BEEN ACKNOWLEDGED IN THE LOWER COURTS FOR MANY YEARS

Despite respondents' attempts to recharacterize the cases (and spin the facts), the lower courts are deeply and irreconcilably divided on the correct application of the *Garrity* rule in the frequently occurring circumstances of this case—as both the majority (App. 19a–20a n.6) and Chief Judge Kozinski in his dissent (App. 30a & n.10) acknowledge.[2]

Respondents seek to deny the well-recognized conflict by focusing on only half the issue and ignoring more than half the cases. The *Garrity* rule protects public employees not only from the risk that compelled statements will be used against them in criminal proceedings (the focus of *Garrity* itself), but also from the risk that they will be punished for asserting their Fifth Amendment rights (the focus in *Gardner* and *Uniformed Sanitation Men*). Respondents contend that no conflict exists by looking only to the first aspect of the *Garrity* rule and ignoring the second. Only with this myopic vision can they deny what so many others have acknowledged.

The first aspect of the *Garrity* rule admittedly is not at issue in this case because (1) petitioners declined to testify until respondents (after punishing petitioners for more than a year) finally clarified the ambiguous circumstances under which the testimony

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[2] Less than a year earlier, in *Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1924 (2008), both the majority and the dissent similarly acknowledged this conflict, as have other federal judges in prior cases. *See* Pet. 20.

was sought, and (2) respondents never attempted to use petitioners' compelled statements against them in criminal proceedings. *Cf.* Opp. 22–31. The concern in this case—as in *Gardner* and *Uniformed Sanitation Men*—accordingly is with the second aspect of the *Garrity* rule (which respondents ignore): whether public employees may be punished for asserting their Fifth Amendment rights.

The essential yet erroneous premise of respondents' entire argument is that *Garrity* is implicated "only . . . when a public employee is asked to provide a compelled . . . statement," Opp. 25–26. As the petition demonstrates (at 11–15), however, three circuits and at least five state supreme courts, following *Gardner* and *Uniformed Sanitation Men*, apply the *Garrity* notice rule to prohibit the punishment of employees who refuse to testify. That is precisely the context of this case.

Respondents repeat their error when they claim that no *Garrity* issue arose here until petitioners were formally compelled to testify. *See* Opp. 23. But between September 2002 and October 2003—when petitioners were enduring their reassignments and being offered an immediate return to their old jobs as soon as they testified—there was substantial uncertainty whether that pressure rose to the level of compulsion. Even Chief Judge Kozinski, with the benefit of 20/20 hindsight and his years of experience, could not predict with confidence whether testimony at that time would have been considered "compelled." *See* App. 28a–29a.[3] During periods of

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[3] The ambiguity of the situation—which would have made it impossible for even a lawyer as distinguished as Chief Judge Kozinski confidently to advise petitioners of the consequences of their decision whether to testify—vividly illustrates the error of

extreme uncertainty such as this, the protections afforded by *Garrity* are critically important.

With the focus on the correct issue, the petition documents (at 10–21) the irreconcilable divisions among the federal circuits and state supreme courts. (1) Three circuits and at least five state supreme courts follow Judge Friendly's analysis in *Uniformed Sanitation Men*, 426 F.2d at 627. A public employer may not punish its employees for refusing to testify unless it has explicitly notified them of their *Garrity* rights. (2) Two other circuits and at least three state supreme courts agree with the Ninth Circuit's analysis below. (3) The First Circuit permits public employers to punish employees for refusing to cooperate with administrative investigations if the totality of the circumstances indicates that the employees had adequate notice of their *Garrity* rights.

This conflict is clear, long-standing, and well-recognized in the lower courts. Moreover, the conflicting positions are so entrenched that further percolation would not resolve the conflict.

III. PETITIONERS' REASSIGNMENTS FOR EXERCISING THEIR FIFTH AMENDMENT RIGHTS WERE PUNITIVE

Respondents' argument (at 16) that petitioners "never proved with admissible evidence" their assertions that they were punished for exercising their Fifth Amendment rights both ignores the procedural posture of this case and dramatically understates petitioners' compelling evidence of punitive retaliation.[4]

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any suggestion that the presence of counsel is an adequate substitute for the clarification that a *Garrity* notice would provide. *Cf.* Opp. 12, 30 n.9.

[4] Respondents' lengthy effort (at 3–10) to recharacterize the underlying facts is similarly unsupportable. For example, it is

This case was resolved on respondents' motion for summary judgment. This Court must therefore "view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (per curiam); *see also, e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004); *Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002).

Viewed in this light, the facts clearly establish that petitioners were punished in retaliation for exercising their Fifth Amendment rights. Petitioners were reassigned the day after asserting their rights, causing each petitioner significant and material hardship, including loss of overtime pay, disruption to their abilities to meet their dependent-care obligations, 2 E.R. 553, 565, 593, and ridicule and demeaning treatment by their superiors and peers, 2 E.R. 539, 552–53. They also suffered significant career setbacks as a result of the reassignments. For example, Deputy Arellano, who had been in his last month of patrol training, could not complete training and was thus ineligible for promotion. 2 E.R. 546. Similarly, Deputy Aguilera had been at the top of the list for a promotion to Narcotics Investigator, and also had been offered a promotion to Major Crimes,

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not even clear whether Flores was ever assaulted. Respondents quote the prosecutor's report for the conclusion "that . . . 'a crime occurred' and that 'there is a strong likelihood that' Petitioner Bardon was the assailant." Opp. 9. The report actually said that, "if the facts as alleged by Martin Flores are to be believed, then it follows that a crime occurred." 4 E.R. 1081. It goes on to note that "[t]he *only* evidence . . . that a deputy inflicted Flores' injuries is the statement of Flores," and "[t]he only evidence . . . suggesting it *might* have been Bardon . . . is not very compelling." *Id.* (emphases added).

but was barred from those opportunities because of the reassignment. 1 E.R. 15–16; 2 E.R. 539.

Despite respondents' vigorous advocacy (at 16–21), the only reasonable inference to be drawn from the summary judgment evidence is that the reassignments were punitive and coercive, not routine and prophylactic. Respondents concede that a suspect's voluntary statement, standing alone, would not have immediately exonerated that deputy of wrongdoing. 2 E.R. 400–13. Yet other officers returned to patrol duty within a day of agreeing to testify, notwithstanding the ongoing investigation and continued uncertainty as to the complicity of each deputy. Sergeant Burke gave a voluntary statement only four days after the alleged incident and three days after being reassigned to desk duty, 4 E.R. 1003, yet was returned to his regular shift immediately, 1 E.R. 16. Deputy Joseph Carrillo voluntarily testified after seven months of desk duty and was reinstated to patrol duties and his regular shift the next day. 1 E.R. 17; 4 E.R. 1066. In stark contrast, Deputies Aguilera, Arellano, Gustavo Carrillo, and Ramirez remained subject to punitive reassignments until they gave compelled statements in October 2003, even though it had become clear by June that only Deputy Bardon remained under suspicion. 2 E.R. 570–72.

Respondents' self-serving assertions (at 16) are not "undisputed evidence" (*id.*). On the contrary, petitioners presented substantial direct evidence (which must be accepted as true in this summary judgment context) that their reassignments were punitive and coercive, not routine and prophylactic. *See, e.g.*, 2 E.R. 570–71 (evidence that respondents Angel and McSweeney said that petitioners were reassigned because of their refusal to testify); 3 E.R. 658–59

(evidence that McSweeney said that petitioners were reassigned because of their refusal to testify); 2 E.R. 539 (evidence that petitioner Aguilera's direct superior said she could return to patrol duty as soon as she agreed to testify, as another deputy had done).

Respondents' suggestions that petitioners were not punished because they were not discharged, *see, e.g.*, Opp. 2, 8–9, 21, 23, 31, like the Ninth Circuit's statement to the same effect, *see* App. 20a, are flatly inconsistent with this Court's precedents. Punishments less severe than the loss of a job can still be illegal and unconstitutional. The petition (at 24–26) reviews the leading cases in the *Garrity* context, but the principle applies much more broadly. *See, e.g.*, *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1935–36 (2008) (retaliation short of discharge constituted illegal retaliation in ADEA context); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 71–73 (2006) (reassignment of responsibilities constituted illegal retaliation in Title VII context); *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990) (denial of promotions, transfers, and recalls violated the First Amendment).

IV. THE ISSUE PRESENTED IN THE PETITION IS IMPORTANT AND CANNOT BE RESOLVED WITHOUT THIS COURT'S INTERVENTION

Respondents' attempts to minimize the importance of this case are unavailing. The mischief wrought by the confusion over this issue is rampant. As detailed in the petition and corroborated by the NAPO *amicus* brief,[5] public employees conduct "tens of thousands"

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[5] Respondents' assertion that the issue is unimportant because "legions of law enforcement agencies [and] inspectors general" failed to call for review is puzzling, given that a former Department of Justice Inspector General (1994–1999) filed the NAPO

of internal investigations each year. *See* Pet. 30–31; NAPO Br. 3. In each investigation, confusion concerning the appropriate application of *Garrity* potentially harms investigators, employees, and the public at large.

First, the confusion over when employee testimony has been compelled absent an explicit *Garrity* notice creates a "trap" for even the most conscientious investigator. As *amici* explain, "[s]ome investigators will fall into a trap created by that ambiguity and, without intending to do so, may inadvertently immunize officer statements and thereby eliminate a source of admissible evidence." NAPO Br. 13; *see also United States v. Friedrick*, 842 F.2d 382, 395–96 (D.C. Cir. 1988) (holding investigators had granted immunity to target of investigation); *cf. United States v. Saechao*, 418 F.3d 1073, 1076 (9th Cir. 2005) (excluding statement held to have been made under compulsion).

Second, the confusion over when and under what circumstances *Garrity* immunity attaches puts public employees in the untenable position of having to "guess" whether they are being compelled to testify and therefore enjoy immunity for their statements. *See* App. 31a–32a (Kozinski, C.J., dissenting). Public employees "deserve better than to be forced to make, without a clear 'bright line' defining their rights, the Hobson's choice between self-incrimination and their livelihood that *Garrity* was designed to eliminate." NAPO Br. 12. Moreover, the dilemma facing the public employees cannot be alleviated by the advice of counsel, as the relevant "guess" regards a matter

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brief on behalf of public safety organizations representing approximately 350,000 members. *See* NAPO Br. 3.

of fact—i.e., is the employer compelling the employee's cooperation?—not of law. *See also supra* note 3.

Third, the confusion undermines efforts of public employers—particularly public safety organizations—to establish and maintain public trust by effectively and efficiently investigating alleged misconduct. The confusion and its impact on investigative efforts are reflected in the various ways that police agencies seek to implement their understanding of *Garrity*. *See* Warnken Br. 6–10 (detailing areas of confusion and resulting array of policies). "When the involved parties—prosecutors, internal investigators, and subject officers—lack clarity about an accused officer's *Garrity* rights, there is significant risk that criminal investigations . . . will be jeopardized." NAPO Br. 13. The public, and public trust, suffers "when prosecutions of potential criminal violations by police officers are impaired due to poor or clumsy internal investigative procedures." *Id.*

Finally, this case provides an ideal vehicle for resolving the conflict. Respondents' argument (at 15–16) based on this Court's denial of certiorari in *Sher* is irrelevant. As the petition explains (at 33–34), this case offers the Court a much better vehicle to resolve the entrenched conflict among the lower courts. *Sher*'s only relevance is in demonstrating the existence of the conflict and the frequency with which this issue arises.

CONCLUSION

The petition for writ of certiorari should be granted.

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On Petition for a Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

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INTEREST OF THE AMICI CURIAE

This brief in support of petitioners' request for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is submitted by the following law enforcement officer associations as amici curiae: The National Association of Police Organizations, Inc. ("NAPO"), the National Troopers Coalition ("NTC"), the Peace Officers' Research Association of California ("PORAC"), the Maryland Troopers Association, Inc. ("MTA"), and the Las Vegas Police Protective Association Metro, Inc. ("LVPPA").[1]

NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers, 11,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. NAPO often appears as amicus curiae

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[1] In accordance with Rule 37.6, the amici curiae certify that counsel for a party did not author this brief in whole or in part and that no entity other than amici or their counsel made a monetary contribution to the preparation or submission of the brief. The amici curiae also certify that all counsel of record received timely notice of amici's intent to file this brief, and the parties have consented to the filing of this brief, as reflected in letters filed with the Clerk of the Court.

in appellate cases of special importance to the law enforcement profession.

NTC represents the interests of the majority of State Trooper and Highway Patrol Associations in the United States. The membership in these associations consists of approximately 40,000 state police troopers throughout the country. The NTC works with its member associations to achieve better working conditions for these troopers and strives to promote legislation and court decisions that make the rights and responsibilities of troopers nationwide more fair, consistent, and understandable.

PORAC is a federation of local, state, and federal law enforcement associations devoted to representing and protecting the rights and benefits of law enforcement officers. With more than 775 member organizations, PORAC represents more than 60,000 officers in California and Nevada. PORAC's Legal Defense Fund provides legal representation to peace officers across the country in criminal, civil, and administrative matters arising within the scope of their employment and in cases whose resolution may impact the rights or responsibilities of PORAC members.

MTA represents approximately 2,000 sworn members of the Maryland State Police. The MTA provides various benefits for its members, including legal representation for sworn members whenever they are under investigation for alleged violations of administrative rules or regulations and advocacy for legislation to improve the rights of its members.

LVPPA represents the interests of approximately 2,700 police and corrections officers in southern Nevada, including many police and corrections

officers employed by the Las Vegas Metropolitan Police Department and the Deputy City Marshals and Municipal Court Marshals employed by the City of Las Vegas. Among other services, LVPPA provides its members legal representation in disciplinary and other matters and lobbies state and local government officials to adopt policies benefiting its members.

Together, these national, state, and local organizations represent approximately 350,000 law enforcement officers throughout the United States. This Court's constitutional rulings in *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), and related cases are of abiding interest to all these organizations.

INTRODUCTION

Every year, tens of thousands of police officers are subject to internal investigations of potential misconduct – criminal misconduct, which can result in prosecution, and administrative misconduct, which can result in employment sanctions including termination. Because of the potentially serious consequences for the subjects of these investigations, it is of paramount importance to law enforcement officers across the United States – federal, state, and local – that this Court resolve the confusion that currently exists over whether public employees are entitled to notice of their immunity rights under *Garrity*.

This case presents the Court with an opportunity to clarify one of the most opaque, and yet significant, areas of Fifth Amendment law and to resolve the current split among the courts of appeals over whether public employees, including police officers, subject to misconduct investigations must be

informed that any compelled incriminating statements they give cannot be used against them in subsequent criminal proceedings. Law enforcement agencies and individual officers across the nation have a strong interest in ensuring that the law on this point is clear so that all participants in the process have an accurate and fair understanding of the legal landscape in which they operate on a daily basis. Individual officers, sworn to enforce the laws and to secure public safety, deserve a clear, "bright line" definition of their rights and obligations under the Fifth Amendment and *Garrity*.

REASONS FOR GRANTING THE PETITION

I. THE WIDESPREAD UNCERTAINTY ABOUT THE FIFTH AMENDMENT'S "*GARRITY* NOTICE" REQUIREMENT IMPAIRS THE EFFECTIVENESS AND FAIRNESS OF INVESTIGATIONS PERFORMED BY PUBLIC AGENCIES

A. Internal Investigations Of Alleged Misconduct By Public Employees Are Central To The Public's Confidence In Government Institutions, Including Especially Law Enforcement Agencies

In recent decades, federal, state, and local governments – and law enforcement agencies in particular – have stressed greater accountability of public institutions and their employees. Internal

investigations of alleged misconduct by public employees are central to these reforms.[2]

At the federal level, the Inspector General Act of 1978 created offices in various federal departments and agencies that are responsible for preventing and detecting fraud, waste, and abuse, in part through pursuing allegations of employee misconduct. Inspector General Act of 1978 (as amended), 5 U.S.C. app. 3 §§ 2, 4, 7. Many state and local government agencies have followed the federal model and established internal investigative entities designed to identify and address, among other things, misconduct by public officials and employees.[3] In

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[2] *See, e.g.*, Wayne W. Schmidt, *Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda, and Weingarten Rights*, LAW ENFORCEMENT EXECUTIVE FORUM (Nov. 2004) ("Because public entities function with the consent of the governed, there is a duty to internally investigate allegations of official and employee misconduct.").

[3] *See, e.g.*, Georgia Office of the Inspector General, http://oig.Georgia.gov (last visited Aug. 26, 2008); Louisiana Office of the Inspector General, http://doa.louisiana.gov/oig/inspector.htm (last visited Aug. 26, 2008); Massachusetts Office of the Inspector General, http://www.mass.gov/ig (last visited Aug. 26, 2008); New York State Office of the Inspector General, http://www.ig.state.ny.us (last visited Aug. 26, 2008) (This office is "entrusted with the responsibility of ensuring that State government, its employees and those who work with the state meet the highest standards of honesty, accountability, and efficiency."); California Office of the Inspector General, http://www.oig.ca.gov (last visited Aug. 26, 2008); Office of the Inspector General for the Texas Department of Criminal Justice, http://www.tdcj.state.txus/inspector.general/inspector.gnl-home.htm (last visited Aug. 26, 2008); and

state and local law enforcement agencies, allegations of misconduct by police officers, including allegations of excessive force and corruption, typically are investigated by the internal affairs and professional responsibility functions that exist, in some form, in virtually every law enforcement agency.

Thorough and prompt internal investigations of allegations of misconduct are central to building and reinforcing the public's confidence in the integrity and professionalism of law enforcement agencies.[4] As articulated by a distinguished former Attorney General, "[e]very police department should make sure that it has in place a vigorous system for investigating allegations of misconduct thoroughly and fairly [and that a] fair system ensures due process both for the officer and for those filing complaints." Janet Reno, U.S. Attorney Gen., Address at National Press Club Luncheon (Apr. 15,

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City of Chicago Office of the Inspector General, http://chicagoinspectorgeneral.org/office-history.html (last visited Aug. 26, 2008).

[4] For example, the Delaware State Police recently established an Office of Professional Responsibility, which performs internal affairs investigations, recognizing that "the public image of the Delaware State Police is, to a large degree, determined by the way the Internal Affairs Office responds to allegations of misconduct of its employees." Delaware State Police Office of Professional Responsibility, http://dsp.delaware.gov/oopr.shtml (last visited Aug. 26, 2008).

1999).[5] Because mere allegations of excessive force or corruption by police officers often receive extensive media coverage, maintenance of the public's trust and confidence in law enforcement agencies demands that police departments conduct comprehensive, fair, and timely internal investigations.[6]

B. Law Enforcement Agencies' Internal Investigations Of Misconduct Allegations Against Law Enforcement Officers Must Respect Their Fifth Amendment Rights

1. Police Officers Are Frequently Subject To Internal Investigations Of Alleged Misconduct

Law enforcement agencies have in recent years made significant strides in improving the integrity of their departments and officers. However, the development of tougher and more rigorous methods for pursuing internal investigations in law enforcement agencies has generated widespread criticism concerning whether these governmental

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[5] A transcript of Attorney General Reno's speech is available at http://www.usdoj.gov/archive/ag/speeches/1999/npc.htm.

[6] *See, e.g.,* Beau Thurnauer, *Best Practices Guide for Internal Affairs: A Strategy for Smaller Departments* 1-3 (International Association of Chiefs of Police, undated), *available at* http:www.theiacp.org/documents/pdfs/Publications/BP-InternalAffairs.pdf ("Effective IA units will insure that complaints are heard . . . [and] dealt with quickly and effectively. * * * [D]epartment staff will have a higher level of public support if every investigation is done fairly and uniformly.").

compliance regimes are fair to individual officers. For example, the Law Enforcement Officers Procedural Bill of Rights Act, currently pending before the House of Representatives, was introduced in response to "a significant lack of due process rights of law enforcement officers during internal investigations [which] has resulted in a loss of confidence in these processes." Law Enforcement Officers Procedural Bill of Rights, H.R. 3440, 110th Cong. (2007).[7]

Notifying police officers of their *Garrity* rights is central to the fair – and constitutionally appropriate – treatment of officers who are subject to internal investigations by their departments. Every year, tens of thousands of law enforcement officers are subject to internal investigations based on citizen complaints, use of force incidents, or other circumstances requiring investigation of potential administrative misconduct or criminal activity.[8] To

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[7] *See also* The State and Local Law Enforcement Discipline, Accountability, and Due Process Act, S. 449, 110th Cong. (2007).

[8] In 2002, more than 25,000 citizen complaints concerning officer use of force were lodged with large law enforcement agencies (those employing more than 100 officers) in the United States. Matthew J. Hickman, U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Citizen Complaints About Police Use of Force* (June 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf. Many such investigations relate to uses of serious or deadly force by police officers, which carry with them greater potential for criminal liability for the involved officers. For example, during the first nine months of 2007, the District of Columbia's Metropolitan Police Department, which employs more than 3,300 sworn

succeed in achieving a fair and appropriate result, these investigations require testimony or written statements by one or more officers who have been accused of misconduct.[9]

2. Notice Of *Garrity* Rights Is The Only Constitutionally Permissible Rule

Police officers should not be afforded special rights or privileges under the Constitution, but they certainly should not be denied the same protections enjoyed by other citizens. This Court has made clear that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity*, 385 U.S. at 500.[10]

Indeed, the Court in *Garrity* directly compared the "coercion inherent" in forcing on public employees the "option to lose their means of

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members, completed a total of 56 internal investigations of serious and deadly use of force incidents. Office of the Indep. Monitor for the Metro. Police Dep't, *Final Report* 40 (June 13, 2008), *available at* http://www.policemonitor.org/080613reportv2.pdf.

[9] The Fifth Amendment's requirements concerning the notice to which public employees accused of wrongdoing are entitled regarding their immunity rights under *Garrity*, of course, have broader application than solely to law enforcement officers.

[10] In fact, *Garrity* marked the Court's departure from an earlier doctrine that afforded police officers less protection under the Constitution than other citizens. Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 457 (1987).

livelihood or to pay the penalty of self-incrimination" to the interrogation practices that gave rise to the Court's decision in *Miranda v. Arizona*, which introduced the constitutional rule that suspects must be advised of their right against self-incrimination before statements made during custodial questioning may be admitted into evidence. *Id.* at 497-98. Accordingly, the Court should fulfill *Garrity*'s promise – as recognized by the Second, Seventh, and Federal Circuits – that public employees, including police officers, also must be "duly advised of [their] options and the consequences of [their] choice" under the Fifth Amendment. *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970). As Chief Judge Kozinski argued in his dissent from the Ninth Circuit's decision in this case, "the only constitutionally permissible rule" is that, unless the government informs public employees that any statements they make cannot be used against them in a criminal proceeding, it may not punish them for refusing to speak. *Aguilera v. Baca*, 510 F.3d 1161, 1177 (9th Cir. 2007) (Kozinski, C.J., dissenting).[11]

3. Clear Notice Of *Garrity* Rights Promotes The Interests Of Law Enforcement Agencies, Individual Officers, And The General Public

Not only is routine notice of *Garrity* rights "the only constitutionally permissible rule," but a "bright line" rule requiring law enforcement agencies to

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[11] The Ninth Circuit's decision in this case is appended to the Petition for a Writ of Certiorari at 1a.

provide officers involved in misconduct investigations with information about their Fifth Amendment rights promotes the shared interests of police departments, individual officers, and the general public.

First, law enforcement agencies would benefit in several respects from a clear constitutional rule requiring that officers subject to internal investigations receive notice of their rights under *Garrity*. Responsible law enforcement executives favor *Garrity* notices because these warnings protect both the integrity of internal investigations and the individual rights of members of their agencies. Moreover, providing officers with accurate information about their Fifth Amendment rights facilitates fact gathering by internal investigators. As demonstrated by the excessive force investigation concerning the conduct of petitioners in this case, confusion about *Garrity's* application can lead to substantial delays in the completion of internal investigations, interfere with officers' willingness and ability to provide information to investigators, and divert resources from core public safety functions such as patrol duties.[12]

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[12] According to the facts recited in the Ninth Circuit's decision in this case, the internal investigation into petitioners' conduct was delayed nearly one year while internal investigators sought "voluntary" statements from the petitioners, who refused to provide them. After the case was referred to the District Attorney's Office for consideration of criminal charges and prosecutors requested compelled statements from three of the petitioners, those petitioners provided statements and promptly were cleared of wrongdoing. For that entire year, petitioners were

Second, individual officers are entitled to be treated fairly and to be afforded a clear explanation of the *Garrity* rules, which directly affect not only their individual constitutional rights as citizens, but also their daily professional lives as law enforcement personnel. Police officers deserve better than to be forced to make, without a clear "bright line" defining their rights, the Hobson's choice between self-incrimination and their livelihood that *Garrity* was designed to eliminate. *Garrity*, 385 U.S. at 497-98.

Simply put, under this Court's decisions in *Garrity* and *Gardner v. Broderick*, 392 U.S. 273 (1968), police officers and other public employees should not be required to speculate as to the content of their constitutional rights. *Lybarger v. City of Los Angeles,* 40 Cal.3d 822, 834, 710 P.2d 329, 336 (1985) (Bird, C.J., concurring). Nor should officers who are pressured to give statements in connection with internal investigations be expected to know, without being told, that they have "automatic" immunity under *Garrity* and when that immunity attaches. *Aguilera*, 510 F.3d at 1179 (Kozinski, C.J., dissenting). In the absence of clear notice of their rights, law enforcement officers facing investigation may take refuge in the much more familiar and straightforward "right to remain silent" under *Miranda*, to the grave detriment of their careers and livelihood. *Id.* Officers face this quandary routinely

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removed from street patrol and assigned to station duties. *Aguilera*, 510 F.3d at 1166-67.

in internal investigations of misconduct allegations, the vast majority of which are never substantiated.[13]

Finally, the general public has an overriding interest in officers being provided a clear understanding of their rights under *Garrity*. When the involved parties – prosecutors, internal investigators, and subject officers – lack clarity about an accused officer's *Garrity* rights, there is significant risk that criminal investigations, involving potential civil rights violations and other crimes, will be jeopardized. A process without *Garrity* notice involves an inherent ambiguity about when officer statements are "compelled," such that *Garrity* immunity attaches automatically. Some investigators will fall into a trap created by that ambiguity and, without intending to do so, may inadvertently immunize officer statements and thereby eliminate a source of admissible evidence. The public is harmed when prosecutions of potential criminal violations by police officers are impaired due to poor or clumsy internal investigative procedures.

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[13] In 2002, large state and local law enforcement agencies investigated more than 25,000 citizen complaints about officer use of force, only 8% of which were sustained as being supported by sufficient evidence to justify disciplinary action against the subject officers. Hickman, *supra* note 8, at 3.

C. The Conflict Among The Courts Of Appeals Regarding *Garrity* Notice Under The Fifth Amendment Has Generated Widespread Confusion And Uncertainty

1. The Ambiguity Resulting From The Circuit Split Has Created At Least Three Conflicting Legal Scenarios Under *Garrity*

Under *Garrity*, public employees' compelled statements cannot be used against them in criminal proceedings. The Court, however, has not yet addressed whether the Fifth Amendment and *Garrity* require the government to notify public employees of their immunity rights. Without the benefit of this Court's guidance, the courts of appeals have created at least three different answers to the question of *Garrity* notice.

The Second, Seventh, and Federal Circuits have ruled that a public employer can compel testimony (or punish silence) only if the employer explicitly notifies the employee that (a) the testimony is being compelled; (b) under *Garrity*, the compelled testimony cannot be used in a subsequent criminal proceeding; and (c) the employer may administratively punish the employee if he or she fails to testify.[14]

The First Circuit has held that a public employer can compel testimony (or punish silence) only when

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[14] *Uniformed Sanitation Men Ass'n*, 426 F.2d at 627; *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7th Cir. 1973); *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir. 2001).

the "totality of the circumstances" demonstrates that the relevant employee objectively should have known about his immunity, even if he was not expressly granted this immunity or given explicit notice of it.[15]

The Fifth, Eighth, and, now, the Ninth Circuits allow a public employer to compel testimony (or punish silence) *in any circumstance* because they hold that *Garrity* immunity attaches automatically upon an employee's being coerced to answer questions, as long as the employer does not demand that the employee waive his *Garrity* immunity.[16]

2. The Confusion Over Application Of The *Garrity* Notice Requirement Is Reflected In The Ambiguous Guidance Provided To Investigators And Officers

The confusion created by the absence of a "bright line" rule requiring *Garrity* notice is reflected in the vague and ambiguous guidance provided to police investigators and officers concerning the conduct of internal investigations. Commanders and supervisors frequently are unsure about the proper procedures to employ in the context of particular

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[15] *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007) (finding that, although the court did not have to decide whether the public employer had to give the relevant employee notice of the application and consequences of his *Garrity* immunity, there was no constitutional violation because the employee could be "fairly charged with [having received] such notice under the circumstances").

[16] *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982); *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Aguilera*, 510 F.3d 1161.

investigations. For example, a Best Practices Guide issued by the International Association of Chiefs of Police opaquely advises police executives to "[g]ive *Garrity* warnings if you feel it is appropriate . . . . You will probably not use *Garrity* [warnings] in every circumstance." Beau Thurnauer, *Best Practices Guide for Internal Affairs: A Strategy for Smaller Departments* 3-4 (International Association of Chiefs of Police, undated). As a result, investigators "sometimes give no warning or give the wrong warning." J. Michael Hannon, *Security Clearances: Know Your Rights*, FOREIGN SERV. J. 58 (Sept. 2005). This lack of clarity about the protections afforded under *Garrity* and the Fifth Amendment invites unfair gamesmanship and manipulation by investigators in defining the circumstances under which requests for statements are "voluntary" as opposed to "compelled," which in turn foster distrust of internal investigators and police supervisors.

II. Use Of *Garrity* Notices Is Widely Regarded As A Best Practice In Law Enforcement And Is A Practical And Effective Method For Protecting Officers' Fifth Amendment Rights

A. *Garrity* Notice Is A Best Practice In Law Enforcement

The Department of Justice has praised the use of *Garrity* warnings as "the best and preferred practice." *See* Letter from Alice S. Fisher, Assistant Attorney Gen., to Vice Chairs of the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency (Jan. 11, 2006). These warnings merit being described as

a best practice because, for the reasons discussed above, they are integral to the fair and effective internal investigations of use of force incidents and allegations of officer misconduct.

Since the 1990s, the Civil Rights Division of the Justice Department has actively promoted the adoption, by state and local law enforcement agencies, of policies requiring that officers receive notice of their rights under *Garrity*. Through consent decrees, memoranda of agreement, findings letters, and technical assistance memoranda, the Civil Rights Division, as part of its legislative mandate under 42 U.S.C. § 14141 to investigate local law enforcement agencies for potential civil rights violations, has either required or recommended that at least eight local police agencies revise their policies to establish protocols for the taking of compelled statements from officers consistent with *Garrity*.[17] With respect to three of these

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[17] These agencies include the District of Columbia's Metropolitan Police Department, the Detroit Police Department, the Warren (Ohio) Police Department, the Cleveland Police Department, the Schenectady Police Department, the Steubenville (Ohio) Police Department, the Virgin Islands Police Department, and the Alabaster (Alabama) Police Department. *See* Memorandum of Agreement Between the U.S. Dep't of Justice and the Dist. of Columbia and the Dist. of Columbia Metro. Police Dep't ¶¶ 58-72 (June 13, 2001), *available at* http://www.usdoj.gov/crt/split/documents/dcmoa.htm; Consent Judgment, *United States v. City of Detroit*, No. 03-72258, ¶ 31 (E.D. Mich. June 12, 2003), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Ruth Crater, Corp. Counsel, City of Detroit, Re: Investigation of the

jurisdictions — Steubenville (Ohio), the Virgin Islands, and Alabaster (Alabama) – the Civil Rights Division specifically recommended that the relevant agencies develop policies or guidelines ensuring that "officers are adequately informed of their rights against self-incrimination." Letter from Civil Rights

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Detroit Police Dep't 4 (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm; Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael O'Brien, Mayor, City of Warren, et al., Re: Warren Police Dep't 20 (Mar. 2, 2006), *available at* http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Subodh Chandra, Dir., Cleveland City Law Dep't, Re: Investigation of the Cleveland Div. of Police 10 (July 23, 2002), *available at* http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf); Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael Brockbank, Corp. Counsel, Schenectady, Re: Investigation of the Schenectady Police Dep't 14-15 (Mar. 19, 2003), *available at* http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf; Consent Decree, *United States v. City of Steubenville*, Civ. No. C2 97-966 (S.D. Ohio Sept. 3, 1997), *available at* http://www.usdoj.gov/crt/split/documents/steubensa.htm; Letter from Civil Rights Div., U.S. Dep't of Justice, to Attorney Gen. Kerry Drue, Dep't of Justice, et al., Re: United States Dep't of Justice Investigation of the Virgin Islands Police Dep't 20 (Oct. 5, 2005), *available at* http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Frank James, Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, Re: Investigation of the Alabaster Police Dep't 15 (Nov. 9, 2004), *available* at http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf.

Div., U.S. Dep't of Justice, to Frank James, Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, Re: Investigation of the Alabaster Police Dep't 15 (Nov. 9, 2004).[18]

B. Law Enforcement Agencies Across The Nation Use *Garrity* Notices As A Practical And Effective Method For Protecting The Integrity Of Internal Investigations And Officers' Rights

Law enforcement agencies at the federal, state, and local levels have implemented a range of policies designed to provide police officers who are subject to internal investigations with notice of the law under *Garrity*. The notice consists of: (1) advising the officer that he or she may refuse to provide a voluntary statement to investigators, but if the employee chooses to make a voluntary statement it may be used against him or her in a subsequent criminal prosecution; and (2) if the officer is required to provide information to investigators and the officer refuses to do so, the agency may impose discipline, including dismissal, although any statement provided by the officer in response to this

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[18] *See also* Consent Decree, *United States v. City of Steubenville*, Civil No. C2 97-966, ¶ 46 (S.D. Ohio Sept. 3, 1997), *available at* http://www.usdoj.gov/crt/split/documents/steubensa.htm ("Officers who are the subject of an [Internal Affairs] investigation shall be informed of their rights and obligations under *Garrity*."); Letter from Civil Rights Div., U.S. Dep't of Justice, to Attorney Gen. Kerry Drue, Dep't of Justice, et al., Re: United States Dep't of Justice Investigation of the Virgin Islands Police Dep't 20 (Oct. 5, 2005), *available at* http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf.

direction cannot be used against him or her in a subsequent criminal proceeding. The specific procedures that individual agencies employ to advise officers of their rights under *Garrity* vary, but providing this basic information is fundamental to any fair and effective internal investigations policy.

1. Federal Agencies

In 2004, a working group in the Department of Justice[19] drafted model *Garrity* warnings that were subsequently approved by the Attorney General and distributed to all federal prosecutors. In its memorandum accompanying the model warning forms, the Department of Justice emphasized to federal prosecutors that, when employees are compelled, including by the risk of losing their jobs, to answer questions, they "must be assured" that their statements may not be used against them in subsequent criminal proceedings. Memorandum from Christopher A. Wray to All Fed. Prosecutors Re: The Increasing Role of the Offices of Inspector Gen., and Uniform Advice of Rights Forms for Interviews of Gov't Employees 2 (May 6, 2005). The

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[19] This working group was formed by the President's Council on Integrity and Efficiency and included representatives from the Department of Justice's Public Integrity Section and the Inspector General community. The working group found that federal agencies had been using a "patchwork of different forms, many of which contain[ed] language that is outdated and unnecessary" to advise public employees of their rights under *Garrity*. Memorandum from Christopher A. Wray to All Fed. Prosecutors Re: The Increasing Role of the Offices of Inspector Gen., and Uniform Advice of Rights Forms for Interviews of Gov't Employees 3 (May 6, 2005).

Justice Department also encouraged the individual Offices of Inspector General to use these model *Garrity* warnings during their investigations. *Id.*

The Department of Justice's Office of the Inspector General and the Federal Bureau of Investigation ("FBI") follow similar practices in their internal investigations. They require employees who do not consent to being interviewed to be provided with a form indicating that neither the interviewee's statements nor information derived from such statements may be used in any subsequent criminal prosecution of the employee, but that the employee has a duty to reply to the questions and that disciplinary action, including dismissal, may be taken if he or she refuses to answer the questions posed. For example, the FBI Manual of Administrative Operations and Procedures requires investigators to issue warnings by using one of two forms, depending on whether investigators are seeking a voluntary or a compelled statement. If a voluntary statement is sought, the FBI uses Form FD-644, which advises the employee that his or her statement is voluntary and that refusal to answer questions cannot result in adverse employment action, although the government is free to use any statements by the employee against him or her in any subsequent criminal prosecution or agency disciplinary proceeding. If an employee's statement is compelled, then FBI investigators use Form FD-645 to advise the employee that the agency can impose sanctions, including dismissal, if he or she refuses to make a statement, but that his or her statement cannot be used in any subsequent criminal prosecution. *See United States v. Friedrick*, 842 F.2d 382, 385 (D.C. Cir. 1988) (citing the FBI

Manual of Administrative Operations and Procedures at sections 13-6.1, 13-6.2).

Other federal agencies, including the State Department and Federal Communications Commission, have adopted similar procedures requiring supervisors and investigators to issue *Garrity* warnings in the context of internal investigations.[20]

2. State And Local Agencies

Many local law enforcement agencies have adopted policies requiring *Garrity* warnings similar to those recommended by the Department of Justice. For example, the District of Columbia Metropolitan Police Department's ("MPD") internal investigations policy requires that investigators advise subject officers either that (1) the officer's statement is not compelled and, therefore, the decision not to provide a statement "will in no way affect employment with the Metropolitan Police Department" or (2) the officer is being questioned about administrative matters and is required to answer questions fully and truthfully, but any self-incriminating information the officer discloses will not be used

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[20] *See* Federal Commc'ns Comm., *Employee Rights and Warnings*, *available at* http://www.fcc.gov/oig/oigrights.html; Treasury Inspector Gen. for Tax Admin., *Investigatory Interview Procedures*, *available at* http://www.ustreas.gov/tigta/oi_interview.shtml; J. Michael Hannon, *Security Clearances: Know Your Rights*, FOREIGN SERV. J. 58 (Sept. 2005); U.S. Fish and Wildlife Serv., *Professional Responsibility Unit and Allegations of Service LE Misconduct* (Feb. 2007), *available at* http://www.fws.gov/policy/441fw5.html.

against him or her in a court of law. D.C. Metro. Police Dep't, Officer Legal Protection Advisory Statement; D.C. Metro. Police Dep't, Reverse Garrity Warning. *Garrity* warnings similar to the MPD's notice concerning compelled statements are used by other police agencies across the United States, including the Miami-Dade Police Department, the Phoenix Police Department, the Los Angeles Police Department, and the New Orleans Police Department.[21]

C. *Garrity* Notice Procedures Are Easy To Implement And Are Effective

As demonstrated by the experience of law enforcement agencies that use *Garrity* warnings, requiring that internal investigators routinely notify officers when their statements are being compelled, and tell them what their rights are under those circumstances, is simple, practical, and straightforward. Agencies such as the FBI and MPD use standardized alternative forms depending on whether investigators are seeking voluntary or compelled statements.

As reflected in the reports of the Independent Monitor for MPD, *Garrity*-related procedures can be extremely effective if properly implemented. A

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[21] Miami Dade Police Dep't, "Subject Employee Statement Form"; City of Phoenix Police Dep't, "Notice of Investigation Form"; L.A. Police Dep't, "Administrative Admonition of Rights and Employee Advisement Form"; and New Orleans Police Dep't, "Notice of NOPD Internal Disciplinary Investigation Rights and Responsibilities of Employee Under Investigation & Notification to Appear to Render a Statement."

review by MPD's Independent Monitor of 780 MPD internal investigations of use of force incidents and misconduct allegations closed between October 2005 and September 2007 identified *no* cases in which MPD obtained an inappropriate compelled statement from a subject officer. Office of the Indep. Monitor for the Metro. Police Dep't, *Final Report* 53 (June 13, 2008). These findings were supported by the United States Attorney's Office for the District of Columbia, which advised the Independent Monitor that cases in which MPD internal investigators had taken an inappropriate compelled statement from a subject officer were "extremely rare." *Id.*

III. This Is An Ideal Case For Review Because It Implicates Many Of The Significant Issues Presented By The Absence Of A "Bright Line" *Garrity* Rule

This case provides the Court with an ideal opportunity to resolve the confusing split among the courts of appeals over whether the Fifth Amendment and *Garrity* require a "bright line" notice rule.

First, this case involves law enforcement personnel who are the public employees most at risk in the absence of a "bright line" *Garrity* notice rule. Because law enforcement by its nature sometimes requires force and confrontation with citizens, which give rise to allegations of use of excessive force and misconduct, and because of the positive reforms that have led to increased accountability for individual officers in performing their duties, tens of thousands of law enforcement officers are subject to internal investigations every year. Accordingly, the protections afforded under the Fifth Amendment and *Garrity* are of paramount importance to these law

enforcement officers, as well as to millions of other public employees.

Second, the dangers created by the current ambiguity in *Garrity*'s application are particularly well illustrated by the facts of this case. These petitioners endured various detrimental employment-related consequences as a result of the ambiguity over when *Garrity* protections attach during the internal investigative process. Straightforward *Garrity* warnings would have provided the officers with certainty about their rights and obligations in responding to inquiries from internal investigators and would have aided in a much more prompt disposition of the underlying investigation. Instead, the investigation languished for nearly a year while the petitioners were harmed by the lack of a clearly defined boundary between "voluntariness" and "compulsion" caused by the absence of a "bright line" *Garrity* notice rule.

Third, most internal investigations, including the one involved in this case, involve allegations of excessive force or other misconduct that prove to be without merit. Even under the extremely common circumstances when the evidence does not support a finding that officers used excessive force or engaged in other forms of misconduct, officers may suffer negative employment-related consequences when they do not have an accurate and fair understanding of their status, rights, and obligations under *Garrity*.

Finally, the Ninth Circuit's opinion below acknowledged the division among the courts of appeals concerning *Garrity* notice and explicitly rejected the approach adopted by several other federal courts of appeals, including, in particular,

the Second, Seventh, and Federal Circuits. The split in the Circuits could not be sharper. This case offers this Court the overdue opportunity to squarely address the requirements of *Garrity*.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 07-1547

IN THE
SUPREME COURT OF THE UNITED STATES

ELIZABETH AGUILERA, *et al.*,

Petitioners,

v.

LEROY BACA, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION OF WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

PARTIES TO THE PROCEEDINGS

Petitioners Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Leroy Baca, individually and as Sheriff of the County of Los Angeles; Williams Stonich, individually and as Under Sheriff of the Los Angeles County Sheriff's Department; Larry Waldie, individually and as Assistant Sheriff of the Los Angeles County Sheriff's Department; William McSweeny, individually and as Commander of the Los Angeles County Sheriff's Department; Neil Tyler, individually and as Commander of the Los Angeles County Sheriff's Department; Thomas Angel, individually and as Commander of the Los Angeles County Sheriff's Department; Arthur Ng, individually and as Captain of the Los Angeles County Sheriff's Department; Alan Smith, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Margaret Wagner, individually and as Lieutenant of the Los Angeles

County Sheriff's Department; Russell Kagy, individually and as Sergeant of the Los Angeles County Sheriff's Department; Brian Proctor, individually and as Sergeant of the Los Angeles County Sheriff's Department; the Los Angeles County Sheriff's Department; and the County of Los Angeles, a municipal corporation, were the defendants in the district court and the appellees in the court of appeals.

Respondent Gustavo Carrillo was a plaintiff in the district court and an appellant in the court of appeals, but is not participating in the petition. Pursuant to Supreme Court Rule 12.6, Mr. Carillo is considered a respondent in this Court.

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Professor Byron L. Warnken, of the University of Baltimore School of Law, respectfully files this Brief of Amicus Curiae in support of the Petition for Writ of Certiorari filed by Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez.[1]

INTRODUCTION

Although the perfect "cert worthy" case is rare, this is such a case. According to the Bureau of Justice Statistics of the Department of Justice, in 2004, there were 836,787 full-time federal, state, and local sworn law enforcement officers in 17,876 law enforcement agencies in this country.[2]

Every day, agencies and officers confront allegations from a superior officer, a citizen, or another agency, triggering both a criminal investigation and an administrative investigation. If, for example, there is an allegation of brutality or excessive force, if evidence is missing, or if corruption or bribery is alleged, such allegation

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] U.S. Dept. of Justice, Bureau of Statistics, Law Enforcement Statistics Summary Findings, (Aug. 8, 2007). http://www.ojp.usdoj.gov/bjs/lawenf.htm#summary

could result in a criminal prosecution and/or administrative discipline, including termination.

For a police officer, there is nothing worse than being simultaneously confronted by criminal investigators and by internal affairs personnel who may or may not have coordinated or may have coordinated, but are pretending not to have coordinated.

Whether or not the agency is acting as one, there is a problem when neither the agency nor the officer knows where the constitutional lines drawn. No one knows where the lines are drawn because courts cannot agree on the meaning of *Garrity* and its progeny 41 years after *Garrity* was decided.

LEGAL BACKGROUND

A. The Law for Citizens under Investigation: From *Bram* Through *Miranda*

More than a century ago, in *Bram v. United States*, 168 U.S. 532 (1897), this Court established the "voluntariness" test for determining whether the police complied with the prohibition against compelled self-incrimination. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court incorporated the Fifth Amendment against the states through the Due Process Clause of the Fourteenth Amendment.

A year after *Malloy*, in *Griffin v. California*, 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965), the Court held that a "chilling effect" on the exercise of the Fifth Amendment privilege is as much a

constitutional violation as actually compelling witnesses to incriminate themselves.

The police have not always complied with the Fifth Amendment. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court found that, notwithstanding its prior holdings, police science literature and police manuals were still instructing police interrogators how to coerce confessions. In response, the Court mandated the now famous *Miranda* warnings for every interrogation conducted when a suspect is in custody. Thus, when voluntary police compliance proved insufficient, it took this Court to protect citizens from police coercion.

In *United States v. Dickerson*, 530 U.S. 428 (2000), this Court held that the dictates of *Miranda* are of constitutional dimension and not merely a court-invented prophylactic rule.

B. The Law for Police under Investigation: From *Garrity* to Confusion

Although this Court mandated that the police not trample on the Fifth Amendment rights of the rest of us, there was nothing to protect police officers from having their Fifth Amendment rights trampled by their own agencies. In some jurisdictions, the law required police officers to waive their Fifth Amendment privilege as a condition of being a law enforcement officer.

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), this Court struck down a state law that mandated

police officers to waive their Fifth Amendment privilege. In so doing, this Court made clear that a police officer has no greater – but also no lesser – Fifth Amendment protection than any other citizen.

The year after *Garrity*, the Court decided *Gardner v. Broderick*, 392 U.S. 273 (1968), in which a police office, subpoenaed to testify before a grand jury, was informed that if he did not waive his right to remain silent, and did not waive immunity from prosecution, he would be discharged, pursuant to state law. He refused to waive his rights and was terminated.

This Court, applying *Garrity* to the chilling effect on the officer's Fifth Amendment rights, as in *Griffin*, held that the unsuccessful attempt to coerce a statement was just as unconstitutional as the successful attempt. In dicta, the Court stated that, if the officer is provided immunity, the officer's failure to answer questions narrowly tailored to official duties could result in termination.

Considering the holdings and dicta of *Garrity* and *Gardner*, the law appeared to be as follows:

(1) if a police agency does not provide immunity to a police officer, a statement given under threat of adverse personnel action is unconstitutionally coerced;

(2) if a police agency does not provide immunity to a police officer, the agency's taking, or threatening to take, adverse personnel action, in

response to the assertion of Fifth Amendment rights, has an unconstitutional chilling effect on the Fifth Amendment;

(3) if a police agency grants immunity to a police officer, but the officer still refuses to answer questions narrowly related to official duties, the officer may be terminated; and

(4) if a police agency grants immunity to a police officer, and the officer answers questions narrowly related to official duties, the officer may be terminated if the answers provide cause for termination.

Four years after *Gardner*, this Court decided the seminal immunity case. In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court established the constitutional immunity standard of "use and derivative use" immunity. Because *Garrity* and *Gardner* were pre-*Kastigar*, they did not have occasion to decide how immunity would work for police officers under investigation.

REASONS FOR GRANTING CERTIORARI

Forty-one years after this Court decided *Garrity*, the only thing that is certain is the uncertainty as to the meaning and application of *Garrity* and its progeny. Courts and law enforcement agencies continue to use multiple interpretations of this body of law. In the meantime, more than 800,000 sworn law enforcement officers in more than 17,000 law enforcement agencies get a sick feeling whenever the agency launches a criminal/internal

investigation.

As a law enforcement officer, it is nerve wracking enough to be under investigation, with both your freedom and your career on the line. It is worse when you do not know whether you can be fired for asserting your Fifth Amendment privilege against compelled self-incrimination.

To this day, the promises of *Garrity* and *Gardner* have, in large measure, remained unfulfilled. At a minimum, those promises are fulfilled in an uneven manner throughout the nation. There are multiple understandings of the meaning of what is referred to as *Garrity* rights. Imagine where law enforcement would be today if, four decades after *Miranda*, among the federal circuits and state supreme courts, there were multiple understandings of the meaning of *Miranda*, with this Court having not weighed in to resolve the confusion.

A. Inconsistency among Police Agencies and Courts in Their Treatment of Immunity and Officer Rights under *Garrity/Gardner*

Most police agencies do not give a formal grant of immunity. They simply inform the officer that the officer must answer questions. If the officer refuses to answer questions, the officer is terminated. A claim by the officer that he or she is not required to answer questions because the agency did not give immunity is met with either (1) the position that no formal grant of immunity is required under *Garrity/Gardner*, or (2) if immunity

is required to be given, it was automatically afforded when the agency made the officer give a statement under "duress."

Some agencies do not provide a formal grant of immunity, but they provide, by statute, regulation, or custom and usage, *Miranda*-like warnings. *Miranda*-like warnings inform the officer that, under *Garrity*, the agency may neither use the officer's statements in a criminal proceeding, nor any evidence that is derived from such statements. The warnings would include the fact that, because such evidence may not be used in a criminal proceeding, the officer may be terminated for failing to answer questions narrowly related to official duties.

Many agencies neither give a formal grant of immunity, nor give *Miranda*-like warnings. Instead, they take the position that they are required to do nothing because under *Garrity*, the agency cannot use any statement, or the derivative of any statement, in a criminal proceeding. As such, they argue that the officer is deemed to know that law, and that law automatically grants self-executing "use and derivative use" immunity. As such, if the officer, immunized as a matter of law, refuses to answer questions, the officer may be immediately terminated.

B. There Are Multiple Areas of *Garrity* Confusion

1. Confusion #1

Does *Garrity* even apply? *Garrity* does not apply solely because a higher ranking police officer says something to a lower ranking officer that ends with a question mark. Most agencies believe that *Garrity* is only triggered when the lower ranking officer is required to answer, i.e., the incriminating statement is made under "duress."

Police officers live in a paramilitary work environment. When dealing with a higher ranking officer, there is always the fear of a charge of insubordination or failure to obey an order. Therefore, lower ranking officers are hesitant to force the issue. Let's assume that a lower ranking officer answers a question, provides incriminating information, and is terminated. The agency may argue that *Garrity* was never triggered.

By analogy to *Miranda*, the suspect argues that he was interrogated without the benefit of *Miranda*, and the police argue that the suspect made a "blurt out" not implicating *Miranda*. This scenario becomes more confusing in a jurisdiction that takes the position that there is no requirement to provide *Garrity* warnings because *Garrity* immunity is self-executing. Even if *Garrity* is self-executing, and even if every officer is deemed to know that, when factually is *Garrity* triggered?

2. Confusion #2

Some cases still imply that, of all people, police officers should not be "standing on a technicality." Moreover, this attitude exists in law enforcement agencies. If there is an allegation of police

brutality or excessive force, or if drugs are missing from the evidence room, or if there is an allegation of corruption or bribery, the last thing that a police agency wants to tolerate is an officer who wants to assert his or her constitutional rights.

The accused police officer is usually more difficult to represent than an accused non-officer. A non-officer has no internal conflict on whether to assert constitutional rights. However, police officers have spent a career believing that only "bad people" stand on their constitutional rights. Thus, an accused officer is frequently reluctant to assert his or her constitutional rights. This dilemma is more complicated when both the law enforcement agency and the law enforcement officer are unsure which of multiple understandings of *Garrity* is the real *Garrity*.

3. Confusion #3

Under the rules of evidence in almost all situations in almost all jurisdictions, polygraph evidence is inadmissible. Nonetheless, by custom and usage and, in many states, by statute, police agencies may, for any reason or no reason, subject their officers to polygraph examinations and make employment decisions based on the results.

Thus, if an officer wishes to assert his constitutional privilege against compelled self-incrimination, the officer is often required to submit to a lie detector test, with the results of the test dictating the results of the personnel action. Thus, the officer who is not compelled to answer

questions orally or in writing may be compelled to answer questions by producing a polygraph printout. In effect, police agencies may do to their own officers what the rules of evidence forbid them to do to citizens – give them a polygraph test and punish them for failing.

4. Confusion #4

Let's assume that a police officer, under an internal affairs investigation, is not given immunity, is asked questions, refuses to answer, and is terminated. Is the case controlled by the *Gardner* holding or the *Gardner* dicta? Under the *Gardner* holding, it is unconstitutional for the police agency to take, or threaten to take, adverse personnel action to punish an assertion of the Fifth Amendment privilege against compelled self-incrimination.

Alternatively, under the *Gardner* dicta, the officer could be terminated for failing to answer questions, if provided immunity. Of course, the problem is to determine (1) whether immunity is automatic and self-executing, (2) whether immunity requires *Miranda*-like warnings, or (3) whether immunity requires a formal grant of immunity.

C. Professor Warnken's Background and Experience in This Area Enable Him to Offer Excellent Assessment as to Whether This Court Should Provide a "Once-and-for–All" *Garrity* Resolution

I know that the issue presented in this case is truly an issue that this Court should address. I have been a law professor since 1977 at the University of Baltimore School of Law. I have argued before this Court. Since 1979, I have taught the Fifth Amendment privilege against compelled self-incrimination, voluntariness, *Miranda* rights, *Garrity/Gardner* rights, and *Kastigar* immunity. This case begs this Court to grant certiorari.

There are more than 800,000 sworn law enforcement officers. *Garrity* issues arise every day. Law enforcement agencies are unsure of the law, and law enforcement officers are unsure of the law, yet officers are fired daily over *Garrity* issues.

Because there are multiple legitimate interpretations of the meaning of *Garrity* and *Gardner*, particular post-*Kastigar*, this case is ripe for this Court to provide a much needed answer.

My perspective on the importance of the case now before this Court goes even deeper. I have significant involvement in the law enforcement community. In 1987, one of my former law students (a police officer turned attorney) asked for my assistance on a *Garrity* issue. We obtained an injunction against the agency.

Based on my work in that case, I published an 86-page law review article, titled "Law Enforcement Officers' Privilege Against Compelled Self-Incrimination, 16 U. Balt. L. Rev. 452 (1987). The article demonstrated -- 21 years ago and 20 years after *Garrity* – why this Court should address

and resolve the *Garrity* dilemma. The article has been cited in five cases, two law review articles, and three filings in this Court.

In 1992, as a result of the article, I was invited to testify in Congress before the Crime & Criminal Justice Subcommittee of the House Judiciary Committee during hearings on the "Rights of Police Officers During Internal Investigations." The Subcommittee reprinted my article in full in House Report 102-112. *Garrity* was an important, yet unresolved, issue in 1987, just as it is today.

Unlike most full-time law professors, I practice law. I have represented law enforcement officers in 33 law enforcement agencies in my career (five federal, six state, 11 county, and 11 municipal). For more than a decade, I have served as general counsel to the Maryland Troopers Association, which represents 2,600 sworn, retired, and civilian members of the Maryland State Police.

I have advised or lectured to 22 law enforcement or pro-law enforcement organizations. This has included advising law enforcement management on *Garrity* and other issues. My "management side" lectures have been presented to the International Association of Chiefs of Police, the Maryland State Police, the Greater Chesapeake Law Enforcement Executive Development, and the Mid-Atlantic Regional Center for Public Safety Innovation & Division of Public Safety Leadership at Hopkins.

I have lectured for police officers and/or police agencies in eight states on numerous issues,

including *Garrity* rights. I know from the requests that I receive, both management and labor are desperate to know their rights and responsibilities under *Garrity* and its progeny.

For seven years, I served as Director of Legal Programs for the National Law Enforcement Officers Rights Center, which was the advocacy and educational arm of the Police Research & Education Project of the National Association of Police Organizations (NAPO). In 1996, I received the "Pete Lauer Memorial Award," which is presented annually, by NAPO, to a "non-cop" who has made the greatest contribution to the nation's law enforcement community.

In addition to two cases on the merits, I was before this Court, in an Amicus Brief, in *Koon & Powell v. United States*, 518 U.S. 81 (1996) (the Rodney King case).

My experiences do not make me any more knowledgeable on these issues, but they do provide me with first-hand experience on how *Garrity* works and does not work and how agencies and officers alike struggle to understand *Garrity*. This Court can – and should – eliminate that struggle.

CONCLUSION

It is respectfully urged that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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July 14, 2008